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In the

Supreme Court of the United States

JOHN STEVEN LeROSE;
REBECCA LAUREN LeROSE-SWEENEY;
FRANK GIGLIOTTI; EUGENE FRANCIS CONNELLY;
RONALD AMATI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do plaintiffs seeking relief pursuant to the Federal Tort Claims Act for torts committed by the United States bear the burden to prove, by a preponderance of the evidence, facts which defeat the discretionary function exception in order to survive a motion to dismiss for lack of subject matter jurisdiction?

PARTIES TO THE PROCEEDING

Other than the Petitioners and the United States, the only other party to this action is Defendant William D. Coger. The appeal, and this Petition, proceeded without Mr. Coger because the district court entered final judgment in favor of the United States only, pursuant to Rule 54(b) on March 6, 2007. The issue presented here does not affect Mr. Coger and Petitioners have served him with a notice of disinterested party, pursuant to Rule 12.6 of the Rules of the Supreme Court of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John Steven Lerose et al., respectfully request that the Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The memorandum opinion of the district court dismissing Petitioners' claims pursuant to the Federal Tort Claims Act for lack of subject matter jurisdiction is unpublished and reprinted at Pet. App. A-13 to A-55. The opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court is also unpublished and reprinted at Pet. App. A-1 to A-10.

JURISDICTION

The district court entered its memorandum opinion granting the Government's motion to dismiss Petitioners' claims under the Federal Tort Claims Act on May 17, 2006. The District Court entered final judgment in favor of the Government pursuant to Rule 54(b) on March 6, 2007. Appellants filed their timely notice of appeal to the United States Court of Appeals for the Fourth Circuit on March 13, 2007. That court affirmed, and entered judgment to that effect on July 10, 2008. This Petition was filed within 90 days of July 10, 2008. Petitioners contend that the district court had jurisdiction pursuant to the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b). The Fourth Circuit had Jurisdiction pursuant to 28 U.S.C. § 1291, and jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The portions of the Federal Tort Claims Act (sometimes the "FTCA") in dispute are as follows:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 1346(b)(1) (2008).

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, *or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.*

28 U.S.C.A. § 2680 (2008) (emphasis added).

STATEMENT OF THE CASE

Petitioners filed suit against the United States ("Government") and former corrections officer William D. Coger ("Coger") in the United States District Court for the Southern District of West Virginia. Petitioners brought claims pursuant to the Federal Tort Claims Act against the United States for its own negligence in hiring, supervising and retaining Coger, and vicariously for the tort of outrage committed by Coger. After the close of extensive discovery and two months before trial, the district court dismissed the negligent hire, retention and supervision claims for lack of subject matter jurisdiction, and granted the Government's motion for summary judgment on Appellants' claim of outrage. In so doing, the district court held that plaintiffs bore the burden of

proving by a preponderance of the evidence that the "discretionary function exception" to the Federal Tort Claims Act did not apply. Petitioners appealed both of the district court's holdings to the United States Court of Appeals for the Fourth Circuit, and that court affirmed by unpublished opinion after full briefing and oral argument. This decision was in line with those of at least three other courts of appeal, but stands in contrast to the decisions of at least three others.

Petitioners now seek a writ of certiorari from this Court to resolve the split among the circuits on the issue of whether plaintiffs seeking relief pursuant to the Federal Tort Claims Act for torts committed by the United States bear the burden to prove, by a preponderance of the evidence, facts defeating the discretionary function exception in order to survive a motion to dismiss for lack of subject matter jurisdiction.

Messrs. LeRose, Connelly, Amati, and Gigliotti were all, at one time, inmates at the Federal Correctional institution at Morgantown ("FCI Morgantown"), a federal minimum security prison camp. Pet. App. A-15. While incarcerated, all four had the misfortune of encountering William Coger, who was a prison guard there. *Id.* Ms. LeRose-Sweeney, who has never been incarcerated, met Coger while visiting her father in prison. *Id.*

Coger hatched a plan to extort money and property from the incarcerated plaintiffs, and to secure romantic involvement with Ms. LeRose-Sweeney. Pet. App. A-24. Coger's conduct involved numerous physical and psychological assaults.

including kicking Mr. Connelly in the shin, *Id.*, and threatening Ms. LeRose-Sweeney that he could throw her father in the SHU – the Special Housing Unit or "hole." Petitioners LeRose, Connelly and Gigliotti reported Coger's misdeeds to prison personnel and participated in a sting operation in which Messrs LeRose and Connelly wore wires to record their conversations with Coger. Pet. App. A-24 - A-25. With their help, and the testimony of Ms. LeRose-Sweeney and Messrs. LeRose and Gigliotti at trial, Coger was convicted of attempted extortion and sentenced to 41 months in prison. Pet. App. A-25. Once released from incarceration, Petitioners brought this case alleging, among other things, that the Government ignored numerous red flags of Coger's dangerousness appearing in his background investigation and conduct after he was hired.

Before being hired by the BOP, Coger had to undergo an extensive background investigation by the Office of Personnel Management ("OPM"), and several interviews. Pet. App. A-16 – A-19. That investigation turned up derogatory information. *Id.* For example, Coger served in the United States Navy prior to being hired by the Bureau of Prisons, and, on March 25, 1998, the OPM investigator generated the following excerpt in a Report of Investigation:

> [HIS MEDICAL RECORD DATED 9/30/87] INDICATES HE WAS EVALUATED FOR HOMICIDAL AND SUICIDAL IDEATION. HE HAS ONGOING PATERNITY SUIT WITH FEMALE WHO HE STATES HAS RUINED HIS LIFE AND REPUTATION. FEELS AND HAS TOLD OTHERS . . . THAT HE SERIOUSLY IS CONSIDERING KILLING HER. ALSO RECENTLY LOST $300 FROM LOCKER AND HAS STATED THAT HE WILL KILL THE INDIVIDUAL . . . HE FINDS RESPONSIBLE[.].

Pet. App. A-16 (caps in original). An entry the same day discusses Coger's fears that certain individuals "MAY BE PLOTTING AGAINST HIM" Pet. App. A-17. (caps in original). He was assessed as suffering from "SITUATIONAL DEPRESSION, DEPRESSED MOOD, [AND] HOMICIDAL IDEATION." *Id.* (caps in original). The records also suggest Coger had "ongoing personal problems and difficulties interacting" with others in the Navy. *Id.* Another excerpt from Coger's personnel filed explains the circumstances under which Coger left the Navy. *Id.* Although Coger ultimately received an honorable discharge, a fact that the BOP and the district court found crucial, the recommendation noted he had been "AN ADMINISTRATIVE BURDEN TO THE NAVY FOR THE PAST FIVE YEARS." *Id.* (caps in original). Specifically, while in the Navy, Coger's passing of bad checks caused a summary court martial resulting in 21 days of confinement and a "PAGE 13" warning. *Id.*

The OPM uses a system of "issue codes" to note questions or concerns raised during its investigations. Pet. App. A-17. The difference between the alphanumeric codes is important. Petitioners argued below that an issue code D "requires a mandatory and extensive resolution of the issue," and a thorough investigation, while the other codes do not. Pet. App. A-18. Indeed, as the district Court found, the applicable BOP regulation stated: "NOTE; 'D' ISSUE CASES WILL BE FORWARDED THROUGH THE REGIONAL DIRECTOR OR ASSISTANT DIRECTOR TO THE [SECURITY AND BACKGROUND INVESTIGATION SECTION]." Pet. App. A-34. (caps in original).

Issue codes on one page of Coger's background investigation report have at some point been changed, by a handwritten alteration, to read "Issue(s) 03A and 07A". Pet. App. A-17 - A-18. The district court did not resolve the issue of exactly what the original issue code was, or whether the letter was a "C" or a "D", or when it was changed, or who changed it. But the district court nevertheless held the "inference" that the codes had been changed from letter "D" to be "speculative and unreasonable." Pet. App. A-36. The district court held, "one is left with the common-sense, lingering question of why the BOP might engage in the type of misconduct plaintiffs attribute to it." Pet. App. A-35. It then concluded, "the objective weakness of the assertion, as a matter of law, falls far short of discharging plaintiffs' burden to demonstrate the inapplicability of the discretionary function exception here." Pet. App. A-36.

After his background investigation, Coger applied for a position at FCI Elkton in Ohio where John LaManna was warden. Pet. App. A-17. LaManna testified that he depended on his human resources personnel when making hiring decisions. Pet. App. A-19. He noted that after an applicant completed his or her interviews, he received a packet of materials for hiring approval, and stated that his review of the packet requires only "a few moments" of his time. *Id.* In March 1998, armed, at least constructively, with all the above information, LaManna hired Coger as a BOP correctional officer. *Id.*

In what turned out to be a harbinger of things to come, an inmate at FCI Elkton, Ragaie Murfik, accused Coger of extortion in or around June 1999. Pet. App. A-20. According to what Murfik reported to the FBI, Coger suggested that unless he was paid by Murfik's family, he would retaliate against Murfik. *Id.* On November 22, 1999, the FBI administered a polygraph test to Murfik. Pet. App. A-21. After asking two questions, the examiner detected deception and ended the interview. *Id.* On December 10, 2001, almost two years after Coger transferred to FCI Morgantown, and after Coger was convicted of attempted extortion at FCI Morgantown, the FBI informed FCI Elkton that it was closing its investigation of the matter. *Id.* The district court also found that "the investigating agent appears to have informed" FCI Elkton personnel that the allegations against Coger were unsubstantiated. *Id.*

On April 10, 2000, and while the extortion investigation of Coger at FCI Elkton was still open and had not been formally concluded, Coger's

request for a transfer to FCI Morgantown was approved. Pet. App. A-22. Bryan Bledsoe was then warden at FCI Morgantown, and he testified that when his subordinate inquired to FCI Elkton about Coger, they were told he was not well-liked by the inmates and that he was "an enforcer of the rules and had some communication issues." *Id.*

Bledsoe asked LaManna whether there were any "conduct issues" involving Coger, and although he did not recall LaManna's response, he suggested FCI Morgantown would probably not have accepted a transferee with serious conduct issues. Pet. App. A-22. LaManna testified that, prior to the transfer decision, he had been informed by a captain at FCI Elkton that the Murfik allegations were unsubstantiated. *Id.* LaManna testified he would not have permitted Coger to transfer had he known the FBI's investigation was ongoing at the time. *Id.*

Coger's misconduct did not end when he arrived at FCI Morgantown. On July 25, 2000, Coger "found" a fully loaded and operational pistol under a locker inside FCI Morgantown. Pet. App. A-23. FCI Morgantown is a minimum security prison camp and several members of the prison staff, including Warden Bledsoe, actually suspected that Coger planted the weapon. *Id.* Coger was experiencing financial difficulties, and FCI Morgantown personnel thought he might have been trying to secure some type of financial reward for his discovery. *Id.* When the FBI confronted Coger with that possibility, however, "he was adamant concerning his innocence" and offered to take a polygraph examination. *Id.* There is no evidence that Coger's offered polygraph test was ever administered. *Id.*

In another incident, on April 1, 2001, Coger allegedly called inmate John Oglesby to the visitor area. Pet. App. A-23. Coger informed Oglesby that he had a visitor, but when he arrived at the visiting room, Coger exclaimed: "I gotcha. April Fools." *Id.* Petitioners alleged below that BOP personnel discovered Coger lied under oath during the investigation of the incident. *Id.*

The incidents that gave rise to this case were also occurring during the spring of 2001, and Messrs. LeRose and Connelly participated in a sting operation against Coger in May of 2001. Pet. App. A-24. As the district court found, Coger attempted to extort money and property from the then-incarcerated plaintiffs. *Id.* He used physical violence at least once, kicking Connelly in the shin. *Id.* As the district court found, he also had "at least implied a desire" for romantic involvement with Lerose-Sweeney. *Id.*

Petitioners filed this case after the formerly-incarcerated individuals were released from prison. After extensive discovery, the United States filed motions to dismiss, or, in the alternative, for summary judgment on March 8, 2006. Plaintiffs responded, arguing *inter alia* that the United States had failed to perform its mandatory duty to conduct a full investigation of Coger's background. The district court granted those motions, and dismissed Petitioners' FTCA claims for lack of subject matter jurisdiction.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT ON THE ISSUE OF WHETHER PLAINTIFFS OR THE GOVERNMENT BEARS THE BURDEN OF PROVING THE APPLICABILITY OF THE DISCRETIONARY FUNCTION EXCEPTION.

In its unpublished decision below, a panel of the Fourth Circuit held that plaintiffs bear the burden of proving the inapplicability of the discretionary function exception to the Federal Tort Claims Act. This decision was in line with Fourth Circuit precedent, *Welch v. United States*, 409 F.3d 646 (4th Cir. 2005), and it deepened a massive split among the circuits on this issue.

Of the courts of appeal that have ruled on this question at least three, the Third[1], Fifth,[2] and Ninth[3], place the burden of proof on the United States; and at least four, the Fourth, the Seventh,[4] the Eighth,[5] and the Tenth,[6] place the burden of proof on plaintiffs. The Sixth Circuit has not expressly decided the issue,[7] but at least one district court there has placed the burden on the

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[1] *Cestonaro v. United States*, 211 F.3d 749, 755 (3rd Cir. 2000).

[2] *Ashford v. United States*, 511 F.3d 501 (5th Cir. 2007).

[3] *O'Toole v. United States*, 295 F.3d 1029, 1032 (9th Cir. 2002).

[4] *Calderon v. United States*, 123 F.3d 947, 950 (7th Cir. 1997).

[5] *Riley v. United States*, 486 F.3d 1030, 1031-32 (8th Cir. 2008).

[6] *Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1167 (10th Cir. 2004)

[7] *Sharp ex rel. estate of Sharp v. United States*, 401 F.3d 440, 443 n.1 (6th Cir. 2005).

plaintiff.[8] District court opinions on this subject in two other circuits – the Second[9] and the Eleventh[10] – contain conflicting judgments.

Significantly, the circuit which has ruled most frequently on this question and is often viewed as a guiding authority – it is the primary source of the opinions cited in Wright, Miller & Cooper's section on this issue in *Federal Practice and Procedure* – is the Ninth Circuit, which places the burden on the United States. *Wright, Miller & Cooper*, Federal Practice and Procedure § 3658.1 at 654 n.3 (2007), citing *inter alia*, *Blackburn v. United States*, 100 F.3d 1426 (9th Cir. 1996); *GATX/Airlog Co. v. United States*, 286 F.3d 1168 (9th Cir. 2000); *Sigman v. United States*, 208 F.3d 760 (9th Cir. 2000)[11]; *Faber v. United States*, 56 F.3d 1122 (9th Cir. 1995). That treatise notes, "[a]lthough the plaintiff bears the initial burden of proving subject matter jurisdiction under the Federal Tort Claims Act, most courts have concluded that the burden of proving the applicability of the discretionary-function exception falls upon the United States." *Id.*

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[8] *Brown v. United States*, 547 F. Supp 2d 759,762 (W.D.Ky. Feb. 27, 2008).

[9] *Compare Brown v. United States*, No. 92-CV-82S, 1994 WL 319015 (W.D.N.Y. June 8, 1994), *with*, *Markes v. United States*, 704 F. Supp. 337, 341 (N.D.N.Y. 1988).

[10] *Compare Airplanes of Boca, Inc. v. United States ex rel. F.A.A.*, 254 F. Supp. 2d 1304 (S.D. Fla. 2003), *with*, *Acosta v. United States*, 207 F. Supp. 2d 1365 (S.D. Fla. 2001).

[11] This opinion was superseded on other grounds by another panel of the Ninth Circuit. *Sigman v. United States*, 217 F.3d 785 (9th Cir. 2000). The second panel held explicitly "[t]he United States has the burden of proving that the discretionary function exception applies." *Id.* at 793.

II. THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THIS COURT TO RESOLVE AN IMPORTANT AND RECURRING ISSUE ON WHICH THE CIRCUIT COURTS ARE SPLIT.

This case presents the important and recurring issue of whether plaintiffs have the burden to prove that the "discretionary function exception" to the Federal Tort Claims Act ("FTCA") does not apply to a given case in order to establish subject matter jurisdiction. The circuits are split on the answer, and this case turns on it. The law in at least three circuits would have given the district court jurisdiction over this case, but the law in at least four others, including the Fourth Circuit, holds that no jurisdiction exists. This split in authority has caused the law applicable to and the results obtained in FTCA cases to diverge sharply across the nation. Quite simply, cases which would result in recovery for plaintiffs in one circuit could be held not even subject to the jurisdiction of another. For numerous reasons, this Court should review this case, and settle the law on this issue now.

First, this case presents an ideal opportunity for this Court to decide which party bears the burden of proof. The parties have developed a complete factual record. They have taken over a dozen depositions for which they traveled from West Virginia to Pennsylvania, South Carolina, Illinois and Texas. They exchanged written discovery responses and have reviewed reams of documents. The case was on the eve of trial before the district court determined that it lacked subject matter jurisdiction over Petitioners' FTCA claims, and granted the

government's motion to dismiss. The case also contains at least one dispositive factual issue turning entirely on which party bears the burden of proof (whether the now illegible "issue codes" were changed from a code requiring a mandatory investigation or some other code).

Second, this problem of inconsistency among the circuits shows no signs of resolving itself. Cases decided even this year reflect a widening gap between the courts on either side of the issue. *Compare Merando v. United States*, 517 F3d 160 (3rd Cir. Feb. 20, 2008) (placing the burden on the United States), *with Sydnes v. United States*, 523 F.3d 1179 (10th Cir. April 22, 2008) (placing the burden on the plaintiff).

Third, who bears the burden of proof is not an academic distinction. It fundamentally alters the focus of the litigation. In this case, the courts below placed an almost insurmountable burden on Petitioners to prove that an illegible altered document once read so as to require an investigation and that someone from the BOP as opposed to another federal agency altered the document, or that BOP personnel actually knew that the FBI's investigation of Coger for extortion was still open when they allowed him to transfer to FCI Morgantown where he extorted the Petitioners, or that the warden at FCI Morgantown had no discretion to remove Coger from contact with inmates when he actually suspected that Coger planted a loaded pistol inside the prison. Moreover, this Court has held that discretionary function exception test must focus on "the nature of the actions taken and on whether they are susceptible to

a policy analysis," thus at least implying a fact-sensitive inquiry. *United States v. Gaubert*, 499 U.S. 315, 325 (1991). Placement of the burden of proof in such a case takes on paramount importance.

Fourth, the side of the split the Fourth Circuit embraced produces a state of affairs which is inefficient and wasteful at best and totally unworkable at worst. Under the Fourth Circuit's framework, plaintiffs have the burden to plead and produce evidence proving why this exception and, by necessary extension, the thirteen other exceptions to the FTCA set forth in 28 U.S.C.A. § 2680, do not apply to any case brought under the FTCA. Indeed, the district court did not even determine whether it had jurisdiction to hear the case until the eve of trial. Presumably, the district court could have found that genuine issues of material fact existed and determined jurisdiction after trial. This approach is totally impractical and is an affront to concerns of judicial economy.

Fifth and finally, the circuits that place the burden of proof on plaintiffs have drifted from this Court's precedent. This Court has held, unequivocally, that a complaint can survive a motion to dismiss based on the discretionary function exception with proper pleading, not proper proof. *Gaubert*, 499 U.S. at 325-26. None of this Court's precedent requires a plaintiff to prove anything to rebut this affirmative defense sometimes available to the United States.

III. THE FEDERAL TORT CLAIMS ACT, SUPREME COURT PRECEDENT, AND JUDICIAL ECONOMY DICTATE THAT THE BURDEN OF PROOF ON THE DISCRETIONARY FUNCTION EXCEPTION BE PLACED ON THE UNITED STATES.

The discretionary function exception to the FTCA was established to "prevent [judicial] 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 798 (1984). Under the doctrine of sovereign immunity, "any . . . waiver [of immunity] must be strictly construed in favor of the government." *Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991).

The debate over who bears the burden of proof often turns on whether the discretionary function exception is treated as a prerequisite to subject matter jurisdiction or as an affirmative defense available to the United States once jurisdiction has already been granted. The general rule is that a party raising an affirmative defense bears the burden of proving it. *Brunswick Bank and Trust Co. v. United* States, 707 F.2d 1355, 1360 (Fed. Cir. 1983). In many cases, courts that place the burden of proof on the plaintiffs subscribe to the former theory, and those that place it on the government, to the latter. The Fourth Circuit and others have held that the successful application of the discretionary function exception deprives the court of jurisdiction. *Williams v. United States*, 50 F.3d 299, 304-05 (4th Cir. 1995), *citing inter alia*, *Lesoeur v. United*

States, 21 F.3d 965, 967 (9th Cir. 1994). This after the fact determination of the effect of discretion, however, does not dictate who bears the burden of proof, as evidenced by the fact that the Ninth Circuit (one of the courts *Meridian, supra,* cited) places the burden squarely on the government. *O'Toole v. United States*, 295 F.3d 1029, 1032 (9th Cir. 2002).

In *Feres v. United States*, 340 U.S. 135 (1950), this Court directly addressed this question, and held that jurisdiction is obtained by submitting a pleading that falls facially under the FTCA, and that any use of the exceptions should be viewed as the raising of affirmative defenses:

> Looking into the detail of the Act, it is true that it provides, broadly, that the District Court 'shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages. *This confers jurisdiction to render judgment upon all such claims.* But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists.

Id., 140-41. (Emphasis added). In *Gaubert*, this Court made a similar rule: "For a complaint to survive a motion to dismiss, it must *allege* facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert*, 499 U.S. at 325-26 (emphasis added).

The Seventh Circuit, applying the *Feres* ruling, held:

> [The] language and reasoning [of *Feres*] as applied to the instant situation means that the court acquired general jurisdiction to hear and decide the case. It was then for the court to determine whether the claim for damages' was recognizable in law. In making such determination, the court as in any other law suit was called upon to decide if the plaintiffs had proven their claim as alleged so as to bring it within the statute relied upon. If so, the plaintiffs were entitled to a judgment against the government unless the latter aptly pleaded an exception contained in Chap. 171 and carried the burden of proving such plea.

Stewart v. United States, 199 F.2d 517, 519 (7th Cir. 1952).

These holdings are, of course, consistent with the structure of the FTCA. Jurisdiction under the FTCA arises out of 28 U.S.C. § 1346(b). The chapter of the United States Code that establishes the discretionary function exception, and other limits of liability appears later in Title 28, and is entitled "Tort Claims Procedure." 28 U.S.C. §§ 2671-80. If the "Exceptions" listed in 28 U.S.C. § 2680 were jurisdictional, they would be listed under 28 U.S.C. § 1346(b), as is the requirement that a currently incarcerated plaintiff have suffered physical injury before bringing a claim under the FTCA. 28 U.S.C. § 1346(b)(2) (2006).

Like the thirteen other exceptions to liability established by 28 U.S.C.A. § 2680, the discretionary function exception operates, in effect, as an affirmative defense. Indeed, the Government pleaded it as its eleventh affirmative defense in this case. Unlike geographic or statutory subject-matter jurisdiction elements, the exceptions to the FTCA are not recited and rebutted by plaintiffs as a routine preliminary to being awarded a court hearing. Instead, plaintiffs discuss them only where the fact set indicates a strong possibility that the government will raise them as a protection against liability.[12] If these exceptions were bona fide elements of subject-matter jurisdiction, then a plaintiff would have to plead, and perhaps produce evidence on, the non-existence of each one in order to support a favorable judgment.

Prescott v. United States approvingly cites *Stewart v. United States*, 199 F.2d 517 (7th Circ. 1952), in its decision to place the burden of proof on the Government, observing that, "[a]s the Seventh Circuit reasoned in *Stewart*, placing the burden on the plaintiff would 'impose upon the plaintiff the burden of proving [thirteen] negative averments. Such a result would border on the preposterous." 973 F.2d 696, 702 (9th Cir. 1992).

The Federal Tort Claims Act was enacted to replace the burdensome private claims system with a more efficient and effective means of holding

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[12] No party questioned jurisdiction in the lower court on the grounds that the plaintiffs had failed to deny that their claim "[arose] out of the loss, miscarriage, or negligent transmission of letters or postal matter," or "the imposition or establishment of a quarantine." 28 U.S.C.A. § 2680(b), (f) (2006).

government accountable for its tortious acts. *Odin v. United States*, 656 F.2d 798, 800-801 (D.C. Cir. 1981). The discretionary function exception limits this waiver of immunity to ensure that government freedom to balance competing policy concerns is not unduly restrained by the court system. *Gaubert*, 499 U.S. at 323 (1991). To fulfill the Congressional intent behind these two provisions of the same act, courts must walk a slender line between the two extremes of construing governmental liability either too narrowly or too broadly. As this Court observed in *Indian Towing Company v. United States*, "When dealing with a statute subjecting federal government to liability for potentially large sums of money, federal courts must not promote profligacy by careless construction, but neither should a court as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." 350 U.S. 61, 69 (1955). Likewise, this Court should not let stand precedent that further contracts the scope of the FTCA by placing the burden of disproving the discretionary function exception on plaintiffs.

IV. CONCERNS OF JUDICIAL ECONOMY SUPPORT PLACING THE BURDEN OF PROOF ON THE UNITED STATES.

Logic and judicial economy also support placing the burden on the government. The government possesses a near total monopoly of information when facing tort actions by private citizens, and placing the burden of proof on plaintiffs in FTCA cases substantially increases the expense of bringing such suits. Cases which might have appeared viable when the burden of proof is placed on the

government may otherwise seem doomed. This allocation of the burden of proof risks chilling advocacy by substantially reducing lawyers' willingness to take FTCA cases on a contingency basis,[13] obstructing citizens' ability to recover for governmental abuses, and withdrawing the disincentive to irresponsible and inefficient bureaucratic action. There is a substantial danger that under the allocation chosen by the Fourth Circuit the vindication of claims against the government will become the preserve of those plaintiffs who combine unusual wealth with an unusual zeal for justice, leaving the less well heeled, or simply those without a voracious appetite for a fight, without legal recourse for harm inflicted on them by our government.

Public policy should favor narrowing, not expanding, the discretionary function exception. In his dissent to the decision in *Rosebush v. United States*, Senior Judge of the United States Court of Appeals for the Sixth Circuit Gilbert Merritt wrote, "Our court's decision in this case means that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the Federal Tort Claims Act. It decimates the Act." 119 F.3d 438, 444 (6th Cir. 1997).

Judge Merritt's dismay at the indiscriminate application of the discretionary function exception is widespread among legal scholars. James R. Levine

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[13] Clients without the means to pay their lawyers on an hourly basis have already been hamstrung by the FTCA's across-the-board reduction of contingent fees. 28 U.S.C. § 2678 (2008). Presumably, the Act places no restriction on the hourly rate a wealthy client can pay his or her, or its, lawyer.

in *The Federal Tort Claims Act: A Proposal for Institutional Reform*, writes, "There is wide scholarly agreement on the failings of the FTCA caused by the discretionary function exception." 100 Colum. L. Rev. 1538, 1547 (2000). "Under current application," Amy Hackman writes in *The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, "the discretionary function exception protects all governmental actions and decisions as long as they can be classified as decisions based on social, economic or political policy considerations. The discretionary function exception overtakes the FTCA when the *Berkovitz/Gaubert* test is applied." 19 Campbell L. Rev. 411, 425-26 (1997). Levine observes that, "The FTCA's main language imposes tort liability on the government 'under circumstances where the United States, if a private person, would be liable.' The application of the discretionary function exception makes this simply not so." 100 Colum. L. Rev. at 1541.

Assuming these broad and vague tests of "discretion" survive, they all but mandate placing the burden of proving discretion on the United States. Just because a private litigant did not find a mandatory duty on the part of a federal agency does not mean that one does not exist. Assigning the plaintiff the burden of finding that mandatory duty shifts the focus of the relevant inquiry away from whether the Act itself is one Congress intended to shield from liability, to whether a private citizen can prove that the government had no discretion. Such a regime would produce results that are inefficient at best and totally arbitrary at worst. In any case, the plaintiff would have to undertake extensive

discovery[14] and briefing to have even a chance at proving his or her case. At the same time, however, the result is totally unpredictable because a plaintiff would have no way of knowing whether the act complained of is actually discretionary, or if prior litigants simply missed the case-winning regulation, operating procedure, or statute. As this Court has held, "the ordinary rule, based on considerations of fairness, does not place upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Campbell v. United States*, 365 U.S. 85, 96 (1961). Although *Campbell* was a criminal case, applying its principles here makes sense. In this case, the Government not only had all the information, but also wrote its own regulations.

The liberal use of the discretionary function exception as a bar to liability is not a necessary consequence of *Berkovitz* and *Gaubert*. In fact, in many specific instances its use runs contrary to the implicit logic of those decisions. Under the district court's holding, the Government has successfully invoked the discretionary function exception if: a) the disputed action involved any element of choice and b) a theoretical Government employee, preternaturally given to abstract thought, could conceivably have been motivated in her choice at least partly by social, economic or political policy concerns, regardless of how routine or trivial her assigned task. One court even observed, "every act

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[14] Discovery is also expensive. Plaintiffs took and defended almost twenty depositions, some of them digitally recorded at a cost of thousands of dollars each. The Government fought discovery at almost every turn, further increasing Appellants' litigation costs. Further increasing the cost, the Government filed a bill of costs seeking reimbursement for over $14,000.

of a rational being involves some choices – speed up or slow down, turn right or left, put helm port or starboard, go full astern or full ahead." *Collins v. United States*, 783 F.2d 1225, 1233 (5th Cir. 1986). This broad construction of the discretionary function exception, which has become the norm, in combination with placing the burden of proof on the plaintiffs, serves as an almost insuperable barrier to finding the government liable for any act of recklessness or negligence. Even that archetypal example of the non-shielded negligent government act, the recklessly driven vehicle, is theoretically protected: a Postal Service driver who runs over a pedestrian could argue that his discretionary choice to speed around a blind corner was the result of a delicate balancing of fuel economy concerns, the need to remain competitive with FedEx, and a desire to prevent public perceptions of Postal Service sloth. A plaintiff would be left in the Orwellian position of having to prove that this decision involved no choice, or was not motivated by policy concerns and thus not one Congress intended to shield from liability.

Numerous post-*Gaubert* decisions interpreting the discretionary function exception show that Courts are far from unanimous on what acts are protected examples of discretion. For example, "[the navy's failure to ensure the functional safety of a pathway was a] mundane, administrative, garden-variety, housekeeping problem that is about as far removed from the policies applicable to the Navy's mission as it is possible to get." *Gotha v. United States*, 115 F.3d 176, 181 (3rd Cir. 1997). "[A government agency's] failure to take safety measures that do not entail significant cost is not considered 'policy-based.'" *Claypool v. U.S.*, 103 F. Supp. 2d

899, 907 (S.D. W.Va. 2000). *Duke v. Department of Agriculture Forest Service* rejected the government's attempted use of the discretionary function exception to protect itself from liability for brain injuries suffered by a child from a falling boulder in a national forest, stating that, "the government has not shown how failure to warn or protect from the danger of a boulder rolling down the man-made slope implicated 'political, social, or economic decisions of the sort that the exception was designed to protect.'" 131 F.3d 1407, 1412 (10th Cir. 1997) (citation omitted). In another case, the D.C. Circuit held: "We find, however, that any discretion exercised by the government with respect to where and how to post signs warning of dangerous road conditions did not implicate 'political, social, or economic' policy choices of the sort that Congress intended to protect from suits under the FTCA." *Cope v. Scott*, 45 F.3d 445, 446 (D.C. Cir. 1995). A district court in the Ninth Circuit reached a similar conclusion on similar facts.[15] *Hughes v. United States*, 116 F. Supp. 2d 1145 (N.D.Cal. 2000). At first glance, all of these acts appear to be discretionary, but the courts found otherwise in each case. They are presented only to illustrate some of the unpredictability that would be eliminated by placing the burden of proof on the United States.

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[15] As further illustration of the importance of this circuit split, a district court in the Fourth Circuit (which, of course, places the burden of proving the discretionary function exception of plaintiffs) reached the opposite conclusion. *Alderman by Alderman v. United States*, 825 F. Supp. 742, 746 (W.D.Va. 1993).

Different courts have also reached different conclusions on negligent hire, retention and supervision claims. For example, in *Tonelli v. United States*, 60 F.3d 492 (8th Cir. 1995), the plaintiffs alleged that the government ignored the illegal conduct of postal workers who stole pornographic material from their post office box, from which the plaintiffs sold such material. *Id.* at 494. The court held:

> Issues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception. *See, e.g., K.W. Thompson Tool Co. v. United States*, 836 F.2d 721 (1st Cir. 1988). *However, this action involves allegations that the post office failed to act when it had notice of illegal behavior.* Failure to act after notice of illegal action does not represent a choice based on plausible policy considerations. Consequently, the unresolved notice issue renders summary judgment inappropriate on the employee supervision and retention claims. Thus, we reverse the district court's dismissal of these claims.

Id. at 496 (emphasis added). Petitioners in this case alleged the same thing as did the plaintiffs in *Tonelli* – that the Government knew of and ignored its employee's illegal behavior. *Tonelli* did not address the burden of proving the discretionary function exception, and was decided more than a decade before the Eighth Circuit indicated that it would place that burden on plaintiffs. *Riley v. United States*, 486 F.3d 1030, 1031-32 (8th Cir.

2008). The Fourth Circuit did, however, place the burden on Petitioners, and reached a different conclusion in this case.

In its analysis of the Bureau of Prisons' handling of Coger, the district court analyzed the government's shortcomings one by one, and found that Appellants failed to meet their burden to prove the government had no discretion so to act. This allowed the United States government to insulate itself from liability by doing nothing more than simply *stating* that its actions were discretionary. With the utterance of just a few words, it placed on already disadvantaged private citizens the burden of disproving an exception to an exception to immunity.

Moreover, this error was not harmless. Throughout the district court's opinion, the court noted that plaintiffs did not meet their burden. The tone of the entire opinion would have changed if the Government, and not Appellants bore the burden of proving the hiring, retention and supervision of a socially alienated, financially irresponsible, felonious prison guard who had once been diagnosed with homicidal ideations, was within the BOP's discretion. It should not have required the existence of an extortion ring for the Bureau of Prisons to intervene to protect vulnerable wards from an employee who had repeatedly given reason to suspect he was grossly unsuited to his position.

These errors compound in light of at least two findings of the district court. First, the district court rejected Appellants' argument that someone changed "issue codes" in Coger's background investigation file to the least serious "A" Code from some other letter. It placed on the Plaintiffs the burden of proving, to

establish jurisdiction, that the issue codes were changed, without discretion, by the BOP, from issue Code "D" and that Code "D" required a mandatory resolution. Second, the district court refused to find that Coger's transfer to FCI Morgantown while the FBI's investigation of him for extortion was still open, without mentioning the investigation, violated a mandatory duty. To establish this seemingly common-sense result, under the district court's holding, Appellants had to establish a multitude of facts, and succeed on numerous inferences about BOP and FBI policy, including whether transfers are allowed during open investigations, whether the Warden at Morgantown was informed about the investigation, and whether, and when, the FBI's investigation of Coger actually ended. The Government, which had control over all the relevant witnesses and documents, and which wrote the policies at issue, had to prove nothing. Surely, this should not be the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 8, 2008

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1256

JOHN STEVEN LEROSE;
REBECCA LAUREN LEROSE-SWEENEY;
FRANK GIGLIOTTI;
EUGENE FRANCIS CONNELLY;
RONALD AMATI,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,
Defendant - Appellee,

and

WILLIAM D. COGER, JR.,
Defendant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.
John T. Copenhaver, Jr., District Judge.
(2:03-cv-02372)

Argued: March 18, 2008
Decided: July 10, 2008
[Entered: July 10, 2008]

Before MICHAEL and GREGORY, Circuit Judges, and David R. HANSEN, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation. Affirmed by unpublished opinion. Judge Gregory wrote the opinion, in which Judge Michael and Senior Judge Hansen joined.

ARGUED: Eric Bruce Snyder, BAILEY & GLASSER, L.L.P., Charleston, West Virginia, for Appellants. Fred B. Westfall, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. **ON BRIEF**: Benjamin L. Bailey, BAILEY & GLASSER, L.L.P., Charleston, West Virginia, for Appellants. Charles T. Miller, United States Attorney, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

GREGORY, Circuit Judge:

John LeRose, Rebecca LeRose-Sweeney, Frank Gigliotti, Eugene Connelly and Ronald Amati, ("Plaintiffs") filed a suit against the United States of America ("United States") under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671 et seq., asserting that the United States negligently hired, retained, and supervised William Coger ("Coger"), a former federal correctional officer, who extorted, *inter alia*, money from the Plaintiffs. Plaintiffs also assert a vicarious liability claim against the United States based on Coger's alleged misconduct. The district court granted the United

States's motion to dismiss for lack of subject matter jurisdiction based on the discretionary function exception to the FTCA. On appeal, Plaintiffs contend that the district court erred by shifting the burden of proof to them that the discretionary function exception did not apply. Plaintiffs also argue that the district court incorrectly held that under West Virginia law, Coger's alleged conduct was outside the scope of employment. We disagree and affirm the district court's decisions.

I.

Plaintiffs asserted negligent hiring, supervision, and retention claims under the FTCA against the United States arising from events that allegedly transpired at FCI Morgantown, a federal prison, and involved Coger, a former correctional officer at FCI Morgantown. Plaintiffs contended that Coger inflicted intentional emotional distress upon them "by attempting to extort and extorting money and other property from each of them." Coger allegedly demanded a truck, money, employment outside the prison, and football tickets among other things.

The United States denied Plaintiffs' allegations and contended that Plaintiffs' claims should be dismissed on summary judgment and/or lack of subject matter jurisdiction. The United States argued that Plaintiffs' theories of negligent hiring, supervision, and retention were barred by the discretionary function exception to the FTCA. In addition, the United States asserted that it was not vicariously liable for Coger's alleged misconduct because he had clearly acted beyond the scope of his

employment as a correctional officer and had engaged in improper actions for his own purely personal motives.

The district court granted the United States's motion to dismiss for lack of subject matter jurisdiction based on the discretionary function exception to the FTCA found in 28 U.S.C. § 2680(a) and dismissed the Plaintiffs' claims for negligent hiring, supervision, and retention against the United States. The district court also granted the United States's motion for summary judgment with regard to Plaintiffs' claim based on vicarious liability because Coger acted purely in his own personal interests and outside the scope of his employment with the United States and Bureau of Prisons ("BOP"). (J.A. 720-67.) Plaintiffs subsequently filed a notice of appeal with regard to the district court's order. We dismissed that appeal, ruling that Plaintiffs' did not appeal a final order or an otherwise appealable interlocutory or collateral order. The district court entered a final judgment in favor of the United States pursuant to Federal Rules of Civil Procedure Rule 54(b). Plaintiffs then filed a notice of appeal.

II.

On appeal, Plaintiffs contend that the district court erred: (1) by placing the burden of proof on them to establish that the discretionary function exception, 28 U.S.C. § 2680(a) did not deprive the district court of subject matter jurisdiction under 28 U.S.C. § 1346(b)(1) of the FTCA; (2) by improperly granting the United States's motion to dismiss for

lack of subject matter jurisdiction; and (3) by improperly granting the United States's motion for summary judgment on the Plaintiffs' vicarious liability claim. We address each of the Plaintiffs' claims below *seriatim*.

A.

Plaintiffs argue the district court improperly placed the burden on them to prove that the discretionary function exemption under the FTCA did not apply. The FTCA creates a limited waiver of the United States's sovereign immunity by authorizing damage actions for injuries caused by the tortuous conduct of federal employees acting within the scope of their employment, when a private person would be liable for such conduct under state law. See 28 U.S.C.A. § 1346(b)(1). This waiver of sovereign immunity, however, is subject to exceptions. "The most important of these [exceptions] ... is the discretionary function exception," McMellon v. United States, 387 F.3d 329, 335 (4th Cir. 2004) (en banc), cert. denied, 544 U.S. 974, 125 S.Ct. 1828 (2005), which provides that the United States is not liable for "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused," 28 U.S.C.A. § 2680(a).

The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from

exposure to suit by private individuals." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984). Congress enacted this exception "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort ... [and] to protect the Government from liability that would seriously handicap efficient government operations." Id. at 814 (internal quotation marks omitted).

In Welch v. United States, 409 F.3d 646 (4th Cir. 2005), we ruled that the plaintiffs bore the burden of proof to show an unequivocal waiver of sovereign immunity exists and to show that none of the FTCA's waiver exceptions apply. However, Plaintiffs in this case attempt to get around our clear precedent by arguing that because Welch was decided in the context of the due care exemption, it is distinguishable from their case which concerns the discretionary function exemption. We find their argument unpersuasive because our holding in Welch clearly dealt with all FTCA exemptions. See also Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995) ("plaintiff bears the burden of persuasion if subject matter jurisdiction is challenged...because 'the party who sues the United States bears the burden of pointing to...an unequivocal waiver of immunity'").

B.

Next, Plaintiffs contend that the district court improperly granted the United States's motion to dismiss for lack of subject matter jurisdiction

because the Plaintiffs did not establish that the discretionary function exemption did not apply. We review a grant of dismissal under Federal Rules of Civil Procedure Rule 12 (b)(1) for lack of subject matter jurisdiction de novo. Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999). As we stated above, plaintiffs have the burden in an FTCA case to prove an unequivocal waiver of sovereign immunity and the existence of subject matter jurisdiction. Welch, 409 F.3d at 650-51.

To determine whether conduct by a federal agency or employee fits within the discretionary function exception, we must first decide whether the challenged conduct "involves an element of judgment or choice." Berkovitz v. United States, 486 U.S. 531, 536, 108 S.Ct. 1954 (1988); see Id. (explaining that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" because "the employee has no rightful option but to adhere to the directive"). If the conduct does involve such discretionary judgment, then we must determine "whether that judgment is of the kind that the discretionary function exception was designed to shield," i.e., whether the challenged action is "based on considerations of public policy." Id. at 536-37. This inquiry focuses "not on the agent's subjective intent in exercising the discretion . . ., but on the nature of the actions taken and on whether they are susceptible to policy analysis." United States v. Gaubert, 499 U.S. 315, 325 (1991). Thus, "a reviewing court in the usual case is to look to the nature of the challenged decision in an objective, or general sense, and ask whether that

decision is one which we would expect inherently to be grounded in considerations of policy." Baum v. United States, 986 F.2d 716, 720-21 (4th Cir. 1993). Moreover, when a statute, regulation, or agency guideline permits a government agent to exercise discretion, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." Gaubert, 499 U.S. at 324.

The BOP's decisions regarding the hiring, supervision and retention of Coger are precisely the type of decisions that are protected under the discretionary function exception. We previously decided that government employers' hiring and supervisory decisions are discretionary functions. Suter v. United States, 441 F.3d 306, 312 n.6 (4th Cir. 2006). The hiring of an employee involves several public policy considerations including the weighing of the qualifications of candidates, weighing of the backgrounds of applicants, consideration of staffing requirements, evaluation of the experience of candidates, and assessment of budgetary and economic considerations. Because this process is multi-faceted, it is precisely the type of decision that Congress intended to shield from liability through the discretionary function exception. The district court properly dismissed the Plaintiffs' negligent hiring, supervision and retention claim.

C.

Finally, Plaintiffs argue the district court improperly granted summary judgment on their vicarious liability claim. We review a district court's grant of summary judgment de novo. Howard v.

Winter, 446 F.3d 559, 565 (4th Cir. 2006). Under West Virginia law, an employer cannot be held vicariously liable for an employee's misconduct if the employee engaged in criminal misconduct for his or her own purpose and interest. In Foodland v. State, 532 S.E.2d 661 (W. Va. 2000), the Supreme Court of Appeals of West Virginia defined the term "scope of employment" under West Virginia law:

> "Scope of employment" is a relative term and requires a consideration of surrounding circumstances, including the character of the employment, the nature of the wrongful deed, the time and place of its commission and the purpose of the act.
>
> In general terms, it may be said that an act is within the course of employment, if: (1) It is something fairly and naturally incident to the business and (2) it is done while the servant was engaged upon the master's business and is done, although mistakenly or ill-advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account.

In Foodland, a store employee stole money from "WIC", a special supplemental nutrition program for women, infants and children. The Supreme Court of Appeals of West Virginia found that "[e]mployee theft [was] certainly not naturally incident to the

owner's business and even though the act was done while the cashier was engaged in the owner's business, the theft was not done with a view to further the owner's interests. The theft arose from a personal motive on the part of the cashier to further her own interests. Under these circumstances, the employee theft from the WIC program simply does not fit within her scope of employment." Foodland, 532 S.E.2d at 665.

The alleged misconduct in this case was clearly for Coger's own personal interests. His demand for a truck, money, employment outside the prison, and football tickets were obviously based on his personal motives and were an attempt to derive benefits for his own personal gain. His threats and acts of intimidation were not designed to further the management and operation of the BOP but rather his own personal interests. Because this type of conduct was specifically barred by the BOP's rules of conduct, was obviously for Coger's own personal gain, and was not intended to benefit the BOP or the United States, the district court correctly concluded that the United States cannot be vicariously liable for such misconduct. Coger's actions were beyond the scope of his employment with the BOP and thus could not be imputed to the United States. The district court properly granted summary judgment in favor of the United States on the Plaintiffs' vicarious liability claim.

III.

For the foregoing reasons, we affirm the district court's decisions.

AFFIRMED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

JOHN STEVEN LEROSE and REBECCA LAUREN LEROSE-SWEENEY and FRANK GIGLIOTTI and EUGENE FRANCIS CONNELLY and RONALD AMATI,
Plaintiffs

v. Civil Action No.: 2:03-2372

WILLIAM COGER,
Defendant

[Entered: March 6, 2007]

JUDGMENT ORDER

In accordance with the memorandum opinion and order entered May 17 , 2006, in the above-styled civil action, it is ORDERED and ADJUDGED that the plaintiffs, John Steven Lerose, Rebecca Lauren Lerose-Sweeney, Frank Gigliotti, Eugene Francis Connelly, and Ronald Amati, take nothing against the defendant, the United States of America, in this action.

This final judgment is entered based upon the findings and conclusions set forth in the memorandum opinion and order entered this same day, which details the reasons underlying the court's additional finding that there is no just reason for delay in entering final judgment as to the United States of America at this time.

The Clerk is directed to forward copies of this written opinion and order to all counsel of record.

DATED: March 6, 2007

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

JOHN STEVEN LEROSE and
REBECCA LAUREN LEROSE-SWEENEY and
FRANK GIGLIOTTI and
EUGENE FRANCIS CONNELLY and
RONALD AMATI ,
Plaintiffs

v. Civil Action No.: 2:03-2372

THE UNITED STATES OF AMERICA
and WILLIAM COGER
Defendants

[Entered: May 17, 2006]

[SEALED] MEMORANDUM OPINION
AND ORDER

Pending are (1) the government's motions (a) to dismiss the first amended complaint (first motion to dismiss"), filed November 28, 2005, (b) to quash the attempted service of plaintiffs' first amended complaint, also filed November 28, 2005[1], (c) to

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[1] On May 26, 2004, in accordance with Rule 5(a), defendants were served with plaintiffs' motion to amend the complaint. Attached to the motion was a copy of the proposed first amended complaint. After the court allowed the amendment, the first amended complaint was filed on October 20, 2004. On June 2, 2005, plaintiffs were directed to serve the modified pleading no later than June 16, 2005, if they had not yet done so.

The government appears to contend that service of the first amended complaint was never accomplished pursuant to Rule 4. As plaintiffs point out, Rule 4 is inapplicable. Rule 5(a)

dismiss plaintiffs' claim for punitive damages, filed February 27, 2006, and (d) to dismiss or, in the alternative, for summary judgment ("second motion to dismiss"), filed March 8, 2006.

I.

Following his guilty plea in June 1999, plaintiff John Lerose was convicted of defrauding a financial institution and filing a false tax return. United States v. LeRose, 219 F.3d 335, 337 (4th Cir. 2000).

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provides "[E]very pleading subsequent to the original complaint... shall be served upon each of the parties." Fed. R. Civ. P. 5(a). Although it appears as a quite unusual practice, the government cites no authority suggesting plaintiffs' pre-amendment service was not effective. Absent such authority, the court ORDERS that the first motion to dismiss be, and it hereby is, denied without prejudice. The court further ORDERS that the motion to quash be, and it hereby is, denied as moot. The first amended complaint is deemed to be the operative pleading.

Another issue is raised as a result of this ruling. The government did not answer or otherwise respond to the first amended complaint until November 22, 2005, when it filed a motion to dismiss and/or for summary judgment. The government noted its belief at that time that the first amended complaint had not been properly served and hence was "not before the Court." (Govt.'s Nov. 22, 2005, Memo. in Supp. at 2 n.2). The government noted as well at that time, however, that the motion was "equally applicable" to the first amended complaint. Inasmuch as the unusual circumstances surrounding service of the first amended complaint appear to have misled the government as to its obligation to answer or otherwise respond to the first amended complaint, the court treats the first motion to dismiss as seeking, in the alternative, an enlargement of time to respond to the first amended complaint as a result of excusable neglect pursuant to Federal Rule of Civil Procedure 6(b) (2). The court ORDERS that the motion as construed be, and it hereby is, granted. The government is deemed to have timely responded.

Following his guilty plea in April 2000, plaintiff Frank Gigliotti was convicted of mail fraud, extortion, aiding and abetting extortion, and attempted extortion under color of official right, and making and subscribing false income tax returns. United States v. Giqliotti, No. 2:99-00219, dkt. entry 13 (W.D. Pa. Apr. 11, 2000). Following his guilty plea in July 2000, Eugene Connelly was convicted of filing false income tax returns. United States v. Connelly, No. 2:00-00135, dkt. entry 4 (W. D. Pa. Jul. 31, 2000). Following a jury trial in February 2001, plaintiff Ronald Amati was convicted of conspiracy, gambling, and obstruction of state law enforcement. United States v. Amati, No. 2:00-00059, dkt. entry 104 (W.D. Pa. Feb. 5, 2001).[2]

At different times after their sentencing hearings, the inmate plaintiffs were designated to FCI Morgantown, West Virginia. (Am. Compl. ¶¶15, 35, 41, 47). Plaintiff Rebecca Lauren Lerose-Sweeney is the daughter of John Lerose. (Id. 26). She visited her father at the facility on a variety of occasions.

During their incarceration, the inmate plaintiffs encountered defendant William Coger, a prison guard employed at the facility. (Id. passim). During his first year with the BOP, Coger was rated as "fully successful[.]" (Govt.'s Mot. to Dismiss and for Summ. J., decl. of Raymond Briggs ¶ 12). The next year, Coger achieved an "'excellent' rating[.]" (Id. ¶ 13). Plaintiffs offer certain historical information concerning Coger, some of which is later used to support their argument that neither dismissal nor summary judgment is appropriate.

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[2] The court refers to these four individuals collectively as the inmate plaintiffs.

A. Navy Service

Coger previously served in the United States Navy.[3] On March 25, 1998, presumably during Coger's background check by the Office of Personnel Management ("OPM") for BOP employment, the following excerpt from a Report of Investigation was generated based upon Coger's medical records during his Navy service:

> [HIS MEDICAL RECORD DATED 9/30/87] INDICATES HE WAS EVALUATED FOR HOMICIDAL AND SUICIDAL IDEATION. HE HAS ONGOING PATERNITY SUIT WITH FEMALE WHO HE STATES HAS RUINED HIS LIFE AND REPUTATION. FEELS AND HAS TOLD OTHERS. THAT HE SERIOUSLY IS CONSIDERING KILLING HER. ALSO RECENTLY LOST $300 FROM LOCKER AND HAS STATED THAT HE WILL KILL THE INDIVIDUAL . . HE FINDS RESPONSIBLE [.]

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[3] According to plaintiffs, although Coger was unwilling to discuss much of his military service during his deposition, he appears to have spoken to the Federal Bureau of Prisons ("BOP") about his military tenure. (Pls.' Resp. at 3 n.1). Plaintiffs also contend records stemming from the BOP background investigation of Coger were destroyed by the BOP in September 2003, just nine months after some of the plaintiffs submitted their administrative claims. (Id.) Plaintiffs contend that this "destruction of documents justifies an adverse inference against the United States and creates genuine issues of material fact." (Id.) Plaintiffs do not specify what documents destroyed by the government might have otherwise aided their case. They also do not discuss any neutrally applicable records retention policy that might apply here.

(Pls.' Resp., sealed ex. B at Coger-P-0072). An entry the same day discusses Coger's fears that certain individuals "MAY BE PLOTTING AGAINST HIM .... " (Id. at Coger-P-0073). He was assessed that day as suffering from "SITUATIONAL DEPRESSION, DEPRESSED MOOD, [AND] HOMICIDAL IDEATION." (Id.) The records also suggest Coger had ongoing personal problems and difficulty interacting with colleagues. (Id.) Later entries in the medical record, dated November 24, 1987, December 21, 1987, January 12, 1988, and July 6, 1990, indicate Coger's condition had stabilized somewhat and that his suicidal and homicidal ideations had ceased. (Id.)

Another excerpt from a similar Report of Investigation discusses Coger's August 30, 1991, recommended administrative separation from the Navy. Although Coger ultimately received an honorable discharge, the recommendation noted he had been "AN ADMINISTRATIVE BURDEN TO THE NAVY FOR THE PAST FIVE YEARS..." (Id. at Coger-P-0070). The recommendation notes that Coger's financial irresponsibility resulted in (1) a summary court martial and 21 days of confinement, and (2) a "PAGE 13" warning. (Id.) Beside a heading near the top of the Report of Investigation appear codes for "ISSUE(S)" relating to this portion of the background check. Those codes, as enlarged, are reproduced as follows:

ISSUE(S) 03A 07A

(Id.) 4[4] A handwritten alteration of the codes is evident. Plaintiffs presently contend the codes, prior to their alteration, were 03D and 07D. (Pls.' Resp. at 4 n.3). The government contends, however, that the codes were changed to 03A and 07A from 03C and 07C. The difference between the three alphanumeric codes is explained in an ("OPM") circular:

> "A" issues are minor and the conduct or issue, standing alone, would not be disqualifying.
>
> . . . .
>
> "C" issues are substantial and the conduct or issue, standing alone, may probably be disqualifying.
>
> "D" issues are major and the conduct or issue, standing alone, would be disqualifying.

(PIs.' Resp., sealed ex. B at Coger-P-0057). Plaintiffs contend "[a]n issue code D requires a mandatory and extensive resolution of the issue, and a thorough investigation, which was not done in this case." (Pls.' Resp. at 5). On September 17, 1997, Coger submitted his Declaration for Federal Employment. (Pls.' Resp., sealed ex. B at Coger-P-27). Coger responded "No" therein to two questions inquiring about whether he had any convictions or courts martial within the preceding 10 years. (Id. at Coger-P-26). He apparently responded likewise to similar inquiries during his pre-employment interview with the BOP.

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[4] Code "3" relates to financial responsibility. (Govt.'s Reply at 3). According to the government, code "7" involves "employment." (Id.) No further elaboration is offered.

(Id. at Coger-P-84, -91).[5] In March 1998, Coger was hired at FCI Elkton. John LaManna was the warden at FCI Elkton at all relevant times. (Pls.' Resp., ex. D at 11). LaManna testified that he depended heavily upon the expertise of his human resource personnel when making hiring decisions. (Id. at 13). He noted that after an applicant has proceeded through 3 separate interviews, the warden is sent a packet of materials for hiring approval. (Id.) LaManna noted his review of the packet requires only "a few moments" of his time.[6] (Id. at 14). In March 1998, Coger was hired by LaManna as a BOP correctional officer at FCI Elkton.

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[5] Coger contended during the pre-employment screening process that the hearing resulting in his ostensible military confinement was not a court martial. (Id. at Coger-P-64). Coger also contended he served no time in the brig because, at the relevant time, he was on restricted duty as a result of a knee injury. (Id.)

[6] Plaintiffs seize on this statement in comparison to a question they asked Stelzer, a BOP Rule 30(b) (6) designee:

> A: The warden is the selecting official. He is the -- he or she is the only person who makes selections.
> Q: Are there criteria for what the warden needs to do when he receives the packet?
> A: The warden -- they have their discretions. Some of them have personal preferences, and they review the packet, and they make a decision. And I'm not usually privileged to what their thought is.
> Q: Is it within the warden's discretion to not review the packet at all and just rubber stamp it?
> A: Not in my experience, no.

(Pls.' Resp., ex. C at 41).

B. Communication and Writing Skills

Lieutenant James Link, Coger's supervisor at FCI Elkton, testified that Coger's communication and writing skills were poor. (Pls.' Resp., ex. E at 18). Although they do not include the policy, plaintiffs note that BOP hiring regulations require the Warden to administer a written test that requires the candidate to draft an account of what he views on a videotape. (Pls.' Resp. at 6). They note Coger's personnel file contains no evidence such a test was ever administered. (Id.)

C. FCI Elkton Employment Issues

Ragaie Murfik was an inmate at FCI Elkton in or around June 1999. (Pls.' Resp., sealed ex. F at FBI-I-0037). Murfik was incarcerated as a result of his arrest and conviction for conspiring to distribute 79 grams of crack cocaine. (Id. at FBI- 1-0025). Murfik reported to the FBI that Coger had attempted to extort money from him. (Id.) According to Murfik, Coger suggested that unless he was paid between $500 to $2500 by Murfik's family, Coger would submit an incident report against Murfik that would likely prevent his desired transfer to an FCI closer to his family. (Id.) On one occasion, Coger allegedly handed Murfik the telephone and dialed Murfik's sister's number to facilitate the monetary transfer. (Id. at FBI-I-0038).

Murfik suggested to the FBI during its investigation of the incident that he attempted to delay Coger and was successful for some period of time. (Id.) On October 22, 1999, however, Coger again inquired about the money. (Id.) Murfik is said

to have handed Coger an envelope on that date that was pre-addressed to Murfik's sister. (Id. at FBI-1-0039). Coger took the envelope after discussing with Murfik the appropriate amount to request from Murfik's sister. (Id.) Murfik's sister received the letter at some later point. (Id.)

On November 22, 1999, the FBI administered a polygraph test to Murfik. (Id. at FBI-1-0056). He was asked the following two questions:

A. Are you lying about that CO demanding money not to file that report?
B. Are you making up a story about that CO demanding money not to file that report?

(Id.) Murfik responded "No" to both statements. (Id.) The examiner detected deception. (Id.) After deception was detected, Murfik did not complain further. (Id. at FBI-1-0006). The alleged extortion note sent by Coger to Murfik's sister was examined by the FBI. (Id. at FBI-1-0006). Coger's fingerprints were not found on the note. (Id.) With the concurrence of an Assistant United States Attorney, a case agent recommended the matter be closed.

On December 10, 2001, the FBI informed FCI Elkton that it was closing its investigation of the matter. (Id. at FBI-I- 0003). It appears, however, that the investigating agent informed Captain Raymond Briggs sometime prior to this formal notification that the matter was being dropped for lack of confirmed allegations. (Govt.'s Mot. to Dismiss and for Summ. J., decl. of Raymond Briggs ¶ 17-18).

D. Coger's Transfer to FCI Morgantown

On February 8, 2000, Coger requested a transfer to FCI Morgantown. (Pls.' Resp., sealed ex. B at Coger-P-0097). Coger's commute to FCI Morgantown was approximately 20 minutes, compared to a 120 minute trip to FCI Elkton. (Id.) On April 10, 2000, the transfer was approved. (Id. at Coger-P-0011). It appears that at the time of the transfer, the FBI investigation into Murfik's allegations had not been formally concluded. (Pls.' Resp., ex. G at 76). Bryan Bledsoe was the warden at FCI Morgantown. He testified that when his subordinate inquired to FCI Elkton about Coger, they were told he was not well liked by the inmates and that he was "an enforcer of the rules and had some communication issues." (Id. at 75).

LaManna personally informed Bledsoe that when Coger first came aboard he had some communication issues, which were much improved with time. (Id. at 77). Bledsoe asked LaManna whether there were any "conduct issues" involving Coger. (Id. at 78). Bledsoe did not recall LaManna's response, but suggested FCI Morgantown would probably not have accepted a transferee depending upon the seriousness of any conduct issues. (Id.) Prior to the transfer decision, LaManna testified that he had been informed by a captain at FCI Elkton that the Murfik allegations were unsubstantiated. (Id. at 59-60). LaManna testified he would not have permitted Coger to transfer had he known the FBI's investigation was ongoing at the time. (Id., ex. D at 59). Plaintiffs do not, however, identify any mandatory regulations that were violated by the transfer.

E. Coger's Activity at FCI Morgantown

1. Weapon Discovery

On July 25, 2000, Coger found a fully loaded .25 caliber pistol under a locker inside FCI Morgantown. Inasmuch as FCI Morgantown is a minimum security prison camp, several members of the prison staff, including Bledsoe, were suspicious that Coger planted the weapon. (See, e.g., id., ex. G at 93). Coger was experiencing financial difficulties, and it was thought he might be trying to secure some type of financial reward for his discovery. (Id., sealed ex. K at 1).

When the FBI confronted Coger with that possibility, however, "he was adamant concerning his innocence" and offered to take a polygraph examination. (Id.) It does not appear that such an examination was ever administered. Further, when the firearm's partial serial number was tracked, the government learned the weapon belonged to an Arizona owner. (Govt.'s Reply at 13).

2. April Fool Prank

On April 1, 2001, Coger allegedly called inmate John Oglesbay to the visitor area. (Id., ex. G at 107). Coger ostensibly informed the inmate that he had a visitor but, after Oglesbay changed clothes and proceeded to the visitor area, Coger greeted him with "I gotcha. April Fools." (Id. at 107-08). It was alleged that Coger lied under oath during an ensuing investigation of the incident. (Id., sealed ex. L at 1). It appears no final action was taken, however,

because of the commencement of the extortion investigation discussed below. (Id., ex. G at 140-41).

3. Extortion of Plaintiffs

The amended complaint alleges that Coger attempted to extort money and property from the inmate plaintiffs and Lerose-Sweeney. (Am. compl. ¶¶ 16-21, 27-32, 36-38, 41-44, 48-50). He used physical violence at least once, kicking Connelly in the shin, and, according to plaintiffs, "promised rewards for compliance and implied punishment for resistance." (Pls.' Resp., ex. M at 38; Pls.' Resp. at 9). He also appears to have at least implied a desire for romantic involvement with Lerose-Sweeney. (Pls.' Resp., ex. O at 18-19).

After some period of time, the inmate plaintiffs took action and reported Coger's misconduct to officials at FCI Morgantown.[7] (PIs.' Resp., ex. M at 38). With the assistance of Lerose and Connelly, Coger eventually became the victim of a sting operation. This occurred after FCI Morgantown officials reported the misconduct to the Office of Internal Affairs ("OIA") on May 18, 2001. (Govt.'s Mot. to Dismiss and for Summ. J., decl. of Bryan Bledsoe ¶ 12). OIA referred the matter to the Office of the Inspector General of the Department of Justice ("OIG"). (Id.) OIG commenced its investigation within two weeks of that referral. (Id.)

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[7] It appears Lerose was the first inmate plaintiff to report the misconduct. (Govt.'s Mot. to Dismiss and for Sums. J. at 3). The report was made to Dr. Jeffrey Hammond, the facility psychologist, on May 17 and May 21, 2001. (Id.)

On September 7, 2001, Coger was arrested at FCI Morgantown. (Govt.'s Mot. to Dismiss and for Summ. J. at 4). He was thereafter indicted, and subsequently convicted, following a jury trial on February 14, 2002, of three counts of violating 18 U.S.C. § 872, which criminalizes extortion by an employee of the United States. United States v. Coger, No. 1:01-00040, dkt. entry 56, 57 (N.D.W. Va. Feb. 14, 2002). On June 21, 2002, he was sentenced to a 41 month term of imprisonment. Id. at dkt. entry 68.

The first amended complaint contains three counts. Count I alleges the intentional infliction of emotional distress against Coger. (Am. compl. ¶¶ 51-56). Plaintiffs further allege "[t]he United States is vicariously liable for Coger's intentional conduct, because Coger acted within the scope of his employment." (Am. compl. ¶ 57). Count II alleges the government negligently hired, retained, and supervised Coger during his BOP tenure. (Id. ¶ 58-61). Count III alleges a claim against Coger alone pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau, 403 U.S. 388 (1971).

In its second motion to dismiss and its alternative motion for summary judgment, the government asserts a host of arguments. With respect to Counts I and II, the government asserts the claims are barred respectively by, inter alia, West Virginia law and the discretionary function exception. These arguments are addressed in reverse order below.

II.

A. The Governing Standards

As noted on page 2 of this memorandum opinion, the government's second motion to dismiss is bifurcated. First, pursuant to Rule 12(b) (I), the government moves for dismissal of Count II pursuant to the discretionary function exception found in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-2680. Second, pursuant to Rule 56(c), it moves for summary judgment on Count I based upon its contention that Coger acted beyond the scope of his employment. The court sets forth below the standard governing each inquiry.

1. Rule 12 (b) (i)

The government's assertion of the discretionary function exception with respect to Count II is, in essence, a defense of sovereign immunity. Such a defense is necessarily made pursuant to Rule 12(b)(1). See Williams v. United States, 50 F.3d 299, 304-05 (4th Cir. 1995) ("Accordingly, if we conclude that the discretionary function exception applies to preclude this action against the United States proper, the suit must be dismissed for want of subject matter jurisdiction under Rule 12(b)(1).")

The standard governing Rule 12(b)(1) motions is well-settled in this circuit, depending upon which of the two alternative ways a defendant chooses to structure the motion. See United States v. North Carolina, 180 F.3d 574, 580 (4th Cir. 1999). The two different methods for pursuing a Rule 12(b)(1) challenge were discussed in Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982):

> First, it may be contended that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based. In that event, all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration. Second, it may be contended that the jurisdictional allegations of the complaint were not true. A trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.

Id. at 1219 (footnote omitted). The first option is the most analogous one for present purposes. In such a situation, the facts alleged by plaintiff are assumed to be true, giving him the same procedural protection as he would be accorded by Rule 12 (b)(6). Id.

2. Summary Judgment

As noted, the government seeks summary judgment on Count I. A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those necessary to establish the elements of a party's cause of action. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A genuine issue of material fact exists if, in viewing the record and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party, a reasonable fact-finder could return a verdict for the non-movant. Id. The moving party has the burden of showing -- "that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the movant satisfies this burden, then the non-movant must set forth specific facts as would be admissible in evidence that demonstrate the existence of a genuine issue of fact for trial. Fed. R. Civ. P. 56(c); Id. at 322-23. A party is entitled to summary judgment if the record as a whole could not lead a rational trier of fact to find in favor of the non-movant. Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991).

Conversely, summary judgment is inappropriate if the evidence is sufficient for a reasonable fact-finder to return a verdict in favor of the non-moving party. Anderson, 477 U.S. at 248. Even if there is no dispute as to the evidentiary facts, summary judgment is also not appropriate where the ultimate factual conclusions to be drawn are in dispute. Overstreet v. Kentucky Cent. Life Ins. Co., 950 F.2d 931, 937 (4th Cir. 1991).

A court must neither resolve disputed facts nor weigh the evidence, Russell v. Microdyne Corp., 65 F.3d 1229, 1239 (4th Cir. 1995), nor make determinations of credibility. Sosebee v. Murphy, 797 F.2d 179, 182 (4th Cir. 1986). Rather, the party opposing the motion is entitled to have his or her version of the facts accepted as true and, moreover,

to have all internal conflicts resolved in his or her favor. Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Inferences that are "drawn from the underlying facts . must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

B. The Second Motion to Dismiss

1. The Limited Waiver of Immunity and the Discretionary Function Exception

In view of the jurisdictional implications, the court first addresses that portion of the government's second motion to dismiss that seeks a Rule 12(b)(1) dismissal of Count II based upon the discretionary function exception.

The FTCA represents a waiver of the federal government's sovereign immunity for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1); see Dolan v. U.S. Postal Serv., 126 S. Ct. 1252, 1256 (2006); Welch v. United States, 409 F.3d 646, 651 (4th Cir. 2005). The waiver is a limited one, however, in view of the specific exceptions outlined in the FTCA, "each of which [being] considered jurisdictional." Welch, 409 F.3d at 651.

As noted recently by our court of appeals, "'The most important of these is the discretionary function exception.'" Suter v. United States, 441 F.3d 306, 310 (4th Cir. 2006) (quoting McMellon v. United States, 387 F.3d 329, 335 (4th Cir. 2004) (en banc)).

The exception provides that the government is absolutely immune for "[a]ny claim . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused .... " 28 U.S.C.A. § 2680(a).

The court of appeals in Suter discussed the policy behind the exception, and the two prerequisites for demonstrating its applicability:

> The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." Congress enacted this exception "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. . . [and] to protect the Government from liability that would seriously handicap efficient government operations."
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> To determine whether conduct by a federal agency or employee fits within the discretionary function exception, we must first decide whether the challenged conduct "involves an element of judgment or choice." Berkovitz v. United States, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988); see id. (explaining that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically

> prescribes a course of action for an employee to follow" because "the employee has no rightful option but to adhere to the directive"). If the conduct does involve such discretionary judgment, then we must determine "whether that judgment is of the kind that the discretionary function exception was designed to shield," i.e., whether the challenged action is "based on considerations of public policy." This inquiry focuses "not on the agent's subjective intent in exercising the discretion . , but on the nature of the actions taken and on whether they are susceptible to policy analysis." Thus, "a reviewing court in the usual case is to look to the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one which we would expect inherently to be grounded in considerations of policy." Moreover, when a statute, regulation, or agency guideline permits a government agent to exercise discretion, nit must be presumed that the agent's acts are grounded in policy when exercising that discretion."

Suter, 441 F.3d 306, 310-11 (some citations omitted).

2. Burden of Proof

The parties initially dispute the proper allocation of the burden of proof for determining the applicability of the discretionary function exception. Our court of appeals resolved that issue recently:

> As a sovereign, the United States is immune from all suits against it absent an express waiver of its immunity. All waivers of sovereign immunity must be "strictly construed. . . in favor of the sovereign." For that reason, it is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists and that none of the statute's waiver exceptions apply to his particular claim. If the plaintiff fails to meet this burden, then the claim must be dismissed.

Welch v. United States, 409 F.3d 646, 650-51 (4th Cir. 2005) (citations omitted) (emphasis supplied). Welch makes clear that section 2680(a) is a qualifying exception to the general waiver of sovereign immunity found in the FTCA. Id. at 651. Accordingly, plaintiffs bear the burden of demonstrating that the discretionary function exception does not apply.

3. Analysis of the Discretionary Function Exception

On page 11 of their response brief, plaintiffs commence discussion of why their negligent hiring, retention, and supervision claim under the FTCA is not barred by the discretionary function exception. Plaintiffs' arguments are couched in terms of the two-prong Berkovitz test. The court notes some variances between plaintiffs' "FACTS" section of their brief and those discrete facts they actually rely upon in attempting to demonstrate their claims are not barred by the discretionary function exception. The court only addresses those

factual elements that plaintiffs' specifically rely upon in the "ARGUMENT" section of their brief for purposes of determining the exception's applicability, [8]

i. First Prong--The Element of Judgment or Choice

The first prong of the Berkovitz test examines the challenged conduct to determine if it "involves an element of judgment or choice." Berkovitz, 486 U.S. 531, 536 (1988). By necessity, judgment or choice is absent, and the exception is inapplicable, when "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow[.]" Id. Under such a circumstance, "the employee has no rightful option but to adhere to the directive." Id.

Plaintiffs contend the government thrice violated mandatory regulations in their hiring, retention, and supervision of Coger. Each putative violation is discussed below.

a. Failure to "Follow Up" on "D" Codes

Plaintiffs contend the BOP "failed to follow-up as required by its policy [sic, Program] [S]tatements on the issue codes 'D' listed in its background investigation but instead simply changed the issue

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[8] For example, plaintiffs have not included within their argument section their allegation that Coger did not satisfactorily complete the communication and writing skills' component of the pre-hiring process.

code to 'A' which required no investigation."[9] (Pls.' Resp. at 12). Plaintiffs thus appear to contend the codes were "D" and were changed by the BOP and not OPM.10[10]

In reaching the conclusion that the BOP altered the codes, plaintiffs deduced a consequence from the known fact that the codes were altered by hand. As such, plaintiffs have at most raised an inference that the BOP is at fault for improperly changing the codes. The court notes, however, that it is required only to "draw [ ] all reasonable. . . inferences from . . . [alleged] facts in the plaintiff's favor .... " See Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999) (noting the standard in a Rule 12(b)(6) setting). The inference offered by plaintiffs does not satisfy this governing standard for a variety of reasons.

First, it is a bit disingenuous for plaintiffs' counsel to assert that "D" codes appeared originally. The court notes that during the Stelzer deposition, plaintiff's counsel stated "It looks like somebody

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[9] The BOP regulation applicable at the time of Coger's screening process provides as follows:

> NOTE: "D" ISSUE CASES WILL BE FORWARDED THROUGH THE REGIONAL DIRECTOR OR ASSISTANT DIRECTOR TO THE [SECURITY AND BACKGROUND INVESTIGATION SECTION].

(BOP Program Stmt. § 731.1.4.d) (hereinafter "P.S. §").

[10] Plaintiffs' position, however, is far from clear. At two different points in their response brief they surmise only that (1) "someone changed . . . [the] issue codes . . ." (Pls.' Resp. at 5), and (2) "someone simply changed the issue codes. . ." (Id. at 14).

pencilled over 3C and 7C and made them an A?" (Stelzer dep. at 186-87 (emphasis supplied)). Plaintiffs do not contend that the extraordinary measures required for addressing "D" codes would likewise apply for "C" codes.[11] The governing regulation does not suggest as much. Plaintiffs' attempted inference, then, appears to be rooted in a late-coming desire to generate a mandatory duty relating to the codes where none would otherwise exist.

Second, regarding the entity responsible for changing the codes, Stelzer testified that she sees these types of hand alterations from the OPM, not the BOP, "[c]onstantly." (Dep. of Patti Stelzer at 186-87) (noting she had seen such alterations "250" times and "probably" more than once a week). She explained that "the investigator in the field goes through and they identify their issues. It goes into OPM and the reviewer goes through their report and makes adjustments." (Id. at 187). Rather than offering deposition testimony from an OPM official to meet this evidence, plaintiffs simply rely upon speculation.

Third, one is left with the common-sense, lingering question of why the BOP might engage in the type of misconduct plaintiffs attribute to it. There is no basis in the record for concluding that anyone at the BOP so badly wanted to hire Coger that they decided to violate the law in doing so. It is thus a struggle to ascertain why the BOP would have acted in the manner suggested.

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[11] The significance of these codes is discussed at pages 6-7 supra.

Confronted with these three considerations, plaintiffs' proposed inference appears both speculative and unreasonable. It is thus not entitled to any significant consideration in the jurisdictional calculus. Moreover, the objective weakness of the assertion, as a matter of law, falls far short of discharging plaintiffs' burden to demonstrate the inapplicability of the discretionary function exception here. Reduced to its essence, plaintiffs have not identified any violation of a mandatory duty with respect to the handling of the codes.

b. Failure to Investigate Coger's "Lies Regarding His Criminal History and Navy Court Martial"

Plaintiffs next contend that the government inadequately handled its investigation into Coger's military discipline and his putative falsehoods relating to it. The court has reviewed certain governing BOP regulations submitted by the parties. The applicable regulation here suggests the BOP has voluntarily undertaken a duty to resolve "derogatory information" that appears during the employment screening process for particular applicants. (See, e.g., P.S. § 731.I.3(b) and (f)).

When derogatory information is disclosed by a background investigation, the responsible investigator is charged with "identify[ing] the information, explain[ing] why it is considered insignificant, or provid[ing] documented resolution." (P.S. § 731.1.6(c)). The specific steps following that admonition appear to require judgment calls at every turn. The following excerpt is illustrative:

> If the background investigation or reinvestigation indicates, or raises an unresolved question as to whether the person is concealing any conduct that reasonably would subject the person to coercion, the . . . [responsible investigator] will arrange for an interview with the employee to discuss:
>
> The issue of concealed conduct that was raised during the . . .investigation . . . and whether or not the person is in fact concealing any conduct that reasonably would subject the person to coercion. If the discussion demonstrates that the person is not concealing any such conduct, no further action is warranted.
>
> . . .
>
> Information which appears derogatory can be refuted or mitigated in some instances by the subject of the background investigation. Similarly, the subject may be able to present circumstances which clarify the derogatory information.

(P.S. § 731.I.6(c)).

Plaintiffs are, in essence, challenging the government's inquiry into Coger's trustworthiness based upon a few responses he gave concerning his military record. Trustworthiness is admittedly an important character trait. (Id.) Determining the presence of that character trait, however, is a judgment-laden inquiry under the regulation:

> Any trait(s) which may show the individual to be . . . untrustworthy . . is significant in the adjudication of the case. . All such information must be viewed in relation to the rest of the file. The adjudicator should try to obtain a complete picture for employment . . .

(Id. S 731.I.6(d) (3) (emphasis supplied))

The regulations also contain two listed methods for resolving derogatory information. As noted, one involves the interview of the potential hiree, at which time he is provided the "opportunity to comment on, refute or mitigate information in the background investigation." (Id. § 731.1.7(a)(2)). The regulation additionally provides "[t]he information obtained during the interview should be analyzed and a recommendation for or against employment, . . . should be contained in the memorandum." (Id. § 731.1.7(a)(3); see also sealed Decl. of Patti Stelzer ¶10 (stating "It is the role of [the BOP] . . . to evaluate all the facts and circumstances surrounding. . . [any background investigation inconsistencies, errors, and omissions on the application forms] . . . when adjudicating suitability for employment with BOP. That decision is always a judgment call.").

These discretionary procedures appear to have been followed here. For example, Coger stated on his Declaration for Federal Employment that he had not within the past i0 years been convicted by a military court martial. (Pls.' Resp., Sealed ex. B at Coger-P-0026). He answered "yes[,]" however, to a pre-employment interview question which inquired whether he had been the subject of an "Article 15,

company punishment, Captain's Mast etc." (Id. at Coger-P-00084). This greatly dilutes plaintiffs' attempted showing in discharge of its burden because it indicates Coger was confused concerning the nature of the proceeding against him while in the Navy. He stated further during the interview, or perhaps during a later inquiry, that he received a 21 day sentence to the brig as a result of the proceeding, but did not serve any time because he was on restricted duty as a result of a knee injury. (Id. at Coger-P-00064).

Apart from this explanation though, the use of an "A" code here was explained by Ms. Stelzer:

> This was resolved based on him receiving a honorable discharge from the military, the highest possible discharge an individual can get.
>
> Plus the other consideration in here is there's no -- there's no provider information. I don't know whether or not this was done by the company clerk who hated him or it was done by a commander. When I see things like this, it usually has something -- that it's somebody's name that they wrote on there.

(Stelzer dep. at 187-88 (emphasis supplied)). 12[12]

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[12] The court also notes that the "Guidelines of Acceptability for Bureau of Prisons' Job Applicants" provide that summary courts martial are only disqualifying if two or more were received in the preceding three years. The summary court martial, if properly characterized, thus would not be a disqualifying event.

Under the totality of these circumstances, the court concludes plaintiffs have failed to demonstrate the government disregarded any mandatory legal duties in handling the issue codes or matters related to them. Again, upon close scrutiny, the matters about which plaintiffs complain involve elements of both judgment and choice.

c. Warden LaManna's Putative Failure to Carefully Review Coger's Application

Plaintiffs' one-sentence argument under this subheading provides that "Warden LaManna failed to review the application carefully; looking at it for a few moments was wholly inadequate." (Pls.' Resp. at 15). It is true that LaManna testified that his review of the documents contained in an application packet takes only "a few moments." (LaManna dep. at 14). Just prior to making this statement though, LaManna testified that he "review[s] the entire packet when . . . it comes to [his] office for approval." (Id. at 13-14). His declaration further clarifies his earlier observations concerning packet review:

> I had reviewed pre-employment packets for hundreds of employees prior to my decision to approve Mr. Coger . . . My procedure for reviewing pre-employment packets has remained essentially unchanged since I began reviewing pre-employment packets for the BOP. When I review pre-employment packets, I follow an established habit and routine. I check each packet to determine whether the pre-employment procedures have been completed. This review includes a review of a checklist signed by the appropriate officers

> which certifies that the various pre-employment procedures have been completed, the documents relating to the pre-employment procedures, and the results of those pre-employment procedures as reported in the packet.
>
> While the process of reviewing a pre-employment packet is not lengthy, I do not "rubber stamp" the pr-eemployment packets. I check them over carefully to make sure that all pre-employment procedures have been completed. . . Based on my experience and training as a Warden for the BOP and the expertise of the Human Resources staff with which I have worked, I am able to review pre-employment packets quickly and make decisions regarding certifications and hiring in a thorough but quick manner.

(LaManna Decl. ¶¶4, 5).

The isolated statement from LaManna's deposition concerning the speed with which he can review packets does not indicate that he violated any mandatory duties imposed by the regulations. Again, elements of judgment and choice are involved in the process. Some wardens may take longer than others to review the packets, with each nevertheless undertaking a careful review. Based upon that conclusion, and the foregoing discussion at pages 24-32 above, the court concludes that plaintiffs have failed to discharge their burden of persuasion under the first prong of the discretionary function analysis.

ii. Second Prong--Considerations of Public Policy

The court next examines "whether th[e discretionary] judgment[s discussed above are]. . . of the kind that the discretionary function exception was designed to shield," i.e., whether the challenged action[s]" are "'based on considerations of public policy.'" Suter, 441 F.3d 306, 310-11 (some citations omitted). The court must examine the nature of the challenged decisions in an objective, or general sense, and ask whether the decisions might inherently be expected to have their roots in considerations of policy. Of significance, however, is our court of appeals' observation concerning a corollary to the two-prong Berkovitz test: "the presumption under the law is that when exercising discretion accorded to it, the government's actions will be 'grounded in policy . . .'" Williams, 50 F.3d at 309.

Unfortunately, in the second-prong section of its brief, plaintiffs raise factual considerations they failed to discuss under the first Berkovitz element. Accordingly, the analysis is hampered somewhat. That observation aside, plaintiffs' entire argument under this second prong is based upon the proposition that the government ignored illegal conduct by Coger in three different ways.

First, plaintiffs contend the Murfik allegations were improperly investigated. Plaintiffs fault the government for failing to compare Coger's handwriting with the extortion note and by asking misguided questions during Murfik's polygraph examination. It appears undisputed, however, that

the FBI detected deception when Murfik was questioned about the note.

Following that inquiry into his truthfulness, Murfik did not complain further about the incident. Additionally, the alleged extortion note sent by Coger to Murfik's sister was examined by the FBI. Coger's fingerprints were not found on the note, despite Murfik's allegation that Coger handled the item. Indeed, at one point in their brief plaintiffs suggest only that Coger "probably sent the extortion note . . ." (Pls.' Resp. at 10).

In view of these considerations, and the fact that an administrative claim was not filed with the FBI, plaintiffs' argument is meritless. 13[13]

Second, plaintiffs contend the government mishandled the investigation concerning the firearm Coger found at FCI Morgantown. Again, the officials at FCI Morgantown quite properly turned this potential violation of federal law over to the FBI, which handled the investigation. When the FBI confronted Coger, he "was adamant concerning his innocence" and he offered to submit to a polygraph examination. Of greater significance is the fact that when the firearm's partial serial number was tracked, the government learned the weapon belonged at some point to an Arizona owner. Plaintiffs have left the Arizona link unexplained.

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[13] Plaintiffs also appear to suggest Coger should not have been transferred to FCI Morgantown while the Murfik investigation was ongoing. They identify no mandatory duty that was violated by the transfer, however, and fail to distinguish between the commission of an illegal act and the mere allegation and investigation of an illegal act.

Again, in view of these considerations, and the fact plaintiffs apparently did not file an administrative claim with the FBI, plaintiffs' argument is meritless.

Third, plaintiffs contend that after officials at FCI Morgantown determined that Coger lied under oath in relation to the April Fool's Day prank, they took no action against him. This conclusion, however, ignores the undisputed factual record.

Warden Bledsoe testified as follows:

> Q. Did you delay this April Fool's investigation?
> A. As I recall, we did delay it.
> Q. Do you generally delay investigations going on in your facility?
> A. Not without cause.
> Q. And what is cause for delaying investigations?
> A. Well, in this particular instance, we had started the investigation of extortion by Mr. Coger on those inmate[] [plaintiffs], and we did not want to do anything that interfered with the investigation by the [OIG].

(Pls.' Mot. for Summ. J., ex. G at 140-41). Warden Bledsoe's decision to accord primacy to the far more serious extortion investigation, and to prevent undue interference with that inquiry, are the precise types of policy judgments that the discretionary function exception was designed to protect. Plaintiffs have not

identified any federal law violated by that reasoned decision. [14]

The court has undertaken the foregoing, lengthy analysis of the two necessary prerequisites for application of the discretionary function exception in this case. This discussion, along with the government's analysis of the governing regulations and statutes found at pages 13-17 of its opening brief, illustrates that plaintiffs have an exceptionally difficult burden in attempting to cast the BOP's hiring, supervision, and retention decisions as anything but discretionary.

It is perhaps for this very reason that many courts have treated FTCA negligent hiring, retention, and supervision claims with greater dispatch. Indeed, just one month ago, our court of appeals was confronted in Suter with plaintiffs who alleged, inter alia, that the FBI negligently hired and retained an undercover agent. The agent infiltrated a large-scale Ponzi and money-laundering

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[14] Plaintiffs also make the following brief argument:

> Third, the BOP ignored the suspicions of Warden Bledsoe and others that Officer Coger burned his own house, a crime to which Officer Coger later admitted on a taped conversation. Captain Kiddy testified at his deposition that the BOP does not want corrections officers who burn their own houses, intentionally or otherwise.

(Pls.' Resp. at 18) (citations omitted). The cited excerpts from the record supporting these contentions are missing from the materials submitted by plaintiffs. Absent some support in the record for the assertions, then, the court might properly decline to reach the issue. In any event, plaintiffs have not illuminated how the BOP violated a mandatory duty in handling the house-burning allegations.

scheme and then "assisted in the formation and operation of business entities used in furtherance of the scheme." Suter, 441 F.3d at 309. Plaintiffs went so far as to allege that the agent and the FBI "'profited financially from [the agent's] participation in the crimes which he was investigating,' including by acquiring an ownership interest in one of the entities used in the scheme." Id. (citation omitted).

Although the district court granted the motion to dismiss on other grounds, the court of appeals chose "a more straightforward basis for affirmance, namely, that the Appellants' claims are barred by the discretionary function exception." Id. at 310. With respect to the negligent hiring and supervision claims, the affirmance was substantially more succinct. Indeed, the court of appeals devoted only two sentences to its dismissal ruling: "We also conclude that Appellants' claim that the FBI negligently hired and supervised Vega is barred by the discretionary function exception. Courts have repeatedly held that government employers' hiring and supervisory decisions are discretionary functions." Id. at 312 n.6.

The court's independent research confirms the court of appeals' observation. See, e.g., Claude v. Smola, 263 F.3d 858, 861 (8th Cir. 2001) ("Even if the government had hired Mr. Smola, however, hiring decisions are a common example of a discretionary function involving policy judgments."); Nurse v. United States, 226 F.3d 996, 1001 (9th Cir. 2000) ("First, the complaint challenges the policy-making defendants' allegedly negligent and reckless employment, supervision and training of the Vancouver and LAX defendants. These acts fall

squarely within the discretionary function exception."); Vickers v. United States, 228 F.3d 944, 950-51 (9th Cir. 2000) (noting various courts have held that decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield, court found INS did not violate any mandatory policy in failing to act within a reasonable time on a termination recommendation); Burkhart v. Washington Metropolitan Area Transit Authority, 112 F.3d 1207, 1217 (C.A.D.C. 1997) ("The hiring, training, and supervision choices that WMATA faces are choices "susceptible to policy judgment."); Red Elk on Behalf of Red Elk v. United States, 62 F.3d 1102, 1104, 1107 (8th Cir. 1995); Richman v. Straley, 48 F.3d 1139, 1146 (10th Cir. 1995) ("Decisions regarding employment and termination are inherently discretionary . . ."); Tonelli v. United States, 60 F.3d 492, 496 (8th Cir. 1995) ("Issues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception."); Attallah v. United States, 955 F.2d 776, 784 (1st Cir. 1992) ("[H]ow, and to what extent the Customs Service supervises its employees certainly involves a degree of discretion and policy considerations of the kind that Congress sought to protect through the discretionary function exception."); Radford v. United States, 264 F.2d 709, 711 (5th Cir. 1959) ("It is well settled that the federal government has the unquestioned right to choose its own employees and is therefore not liable for acts done in the exercise of that right."); 1 Andrew J. Ruzicho & Louis A. Jacobs, Employment

Practices Manual § 4:9 (1994 and Supp. 2006) ("Similarly, federal officials will not be held liable under the Federal Torts Claims Act for engaging in the discretionary government function of hiring."); Jason & Longstreth, 2 Handling Federal Tort Claims, §12.0611] [c] ("discretionary function exclusion has with great consistency been found applicable to the Government's decisions to hire or fire employees."); 35A Am. Jur. 2d Federal Tort Claims Act § 41.

Based upon the foregoing, plaintiffs have not satisfied their burden with respect to either prong of the discretionary function exception. The court, accordingly, ORDERS that the government's second motion to dismiss be, and it hereby is, granted as to Count II. The court further ORDERS that Count II of the first amended complaint be, and it hereby is, dismissed.

C. The Motion for Summary Judgment

As noted, the government seeks summary judgment pursuant to Rule 56(c), as opposed to dismissal under Rule 12(b)(1), as to Count I. The government contends that it cannot be held vicariously liable for the intentional infliction of emotional distress Coger visited upon the plaintiffs because he acted outside the scope of his employment. One commentator summarizes the unexpected source of governing law:

> Under current law, the United States' vicarious liability for the intentional torts of federal law enforcement officers is left to the vagaries of state respondeat superior law. A 1974 amendment to the Federal Tort Claims

> Act (FTCA) created government liability for the intentional torts of federal law enforcement officers acting within the scope of their employment. But courts have applied state law to determine whether a law enforcement officer acted within the scope of employment when the tort was committed, which in turn determines the United States' liability. Application of widely varied state respondeat superior law to claims under the 1974 Amendment has resulted in a random pattern of government liability lacking any coherent policy rationale.

Dianne Rosky, Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials, 36 U.C. Davis L. Rev. 895, 896 (2003); see also Gupton v. United States, 799 F.2d 941, 942 (4th Cir. 1986). Additionally both plaintiffs and the government concur that West Virginia law is the proper source to inform the scope of employment inquiry.

The seminal West Virginia case is Musgrove v. Hickory Inn, Inc., 168 W. Va. 65, 65, 281 S.E.2d 499, 500 (1981). In syllabus point 3, the supreme court of appeals stated as follows:

> An agent or employee can be held personally liable for his own torts against third parties and this personal liability is independent of his agency or employee relationship. Of course, if he is acting within the scope of his employment, then his principal or employer may also be held liable.

Id. at 65, 281 S.E.2d at 500. The development of this rule was left for later cases. Two of those subsequent decisions illustrate the parameters and application of the rule.

The first case is Barath v. Performance Trucking Co., Inc., 188 W. Va. 367, 368, 424 S.E.2d 602, 603 (1992). Barath was the victim of an intentional tort committed by defendant David Cook Jr., alleged to be an employee of defendant Performance Trucking Company, Inc. ("Performance Trucking"). Cook's father, co-defendant David Cook Sr., was also employed by Performance Trucking. Just prior to the younger Cook's attack on Barath, a witness heard the son state that the elder Cook had told him to attack Barath the next time he encountered him. This evidence, along with the fact that Performance Trucking had been the victim of a labor strike, and that Barath had involvement with the strike as a union member, caused the West Virginia court to conclude summary judgment was inappropriate:

> While the evidence on this point was exceedingly indirect, this Court believes that it did suggest that union unrest might have caused financial losses to Performance Trucking Co., Inc., that David Cook, Sr., as manager of the company, was aware of and felt the losses and had developed animosity toward the appellant, and as a consequence had directed his son to "beat" the appellant. Overall, it is suggested, but certainly not proven, that David Cook, Jr., who might have been an employee of Performance Trucking Co., Inc., at the time

> of the battery in this case, might have been acting within the scope of his employment at the time of the battery.

Id. at 371, 424 S.E.2d at 606.

In comparison, the second case is Foodland v. West Virginia Department of Health and Human Resources, 207 W. Va. 392, 532 S.E.2d 661 (2000). In Foodland, a grocery store participating in a state welfare benefits program was penalized by a regulating state agency after a store employee perpetrated a fraud on the state under the program. The employee was terminated a short time after the theft was perpetrated, and the store did not profit from the dishonest act. The supreme court of appeals noted the following discussion of "scope of employment[:]"

> "Scope of employment" is a relative term and requires a consideration of surrounding circumstances, including the character of the employment, the nature of the wrongful deed, the time and place of its commission and the purpose of the act.
>
> In general terms, it may be said that an act is within the course of the employment, if: (1) It is something fairly and naturally incident to the business and (2) it is done while the servant was engaged upon the master's business and is done, although mistakenly or ill-advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly

> from some external, independent and personal motive on the part of the servant to do the act upon his own account.

Id. at 397, 532 S.E.2d at 665 (emphasis supplied). Based upon this further explication of the Musgrove rule, the supreme court of appeals concluded the thief acted outside the scope of her employment:

> Employee theft is certainly not naturally incident to the owner's business and even though the act was done while the cashier was engaged in the owner's business, the theft was not done with a view to further the owner's interests. The theft arose from a personal motive on the part of the cashier to further her own interests. Under these circumstances, the employee's theft from the WIC program simply does not fit within her scope of employment.

Id.

The present action bears a much stronger resemblance to Foodland than Barath. Extortion and abuse of trust are not naturally incident to the BOP mission. Indeed, there is complete dissonance between the two. Although Coger accomplished his misdeeds at FCI Morgantown while clothed, literally and figuratively, with BOP authority, his misconduct was not done with an eye toward furthering the BOP's interests. His illegal acts instead arose from a personal motive on his part to advance his own interests. As in Foodland, the harm he inflicted upon plaintiffs does not fit within his scope of employment.

Plaintiffs offer two arguments to overcome this result. First, they contend the decision in Travis v. Alcon Laboratories, Inc., 202 W. Va. 369, 504 S.E.2d 419 (1998), imposes vicarious liability on the government. Travis, however, is unlike this action. In Travis, the employer's agents were apparently aware of a supervisor's misconduct and took only meager steps to remedy the situation over what appeared to be a three- to four-year period. Some actions by the employer's agents even suggested they were directly facilitating the supervisor's mistreatment of employees in his charge. The supreme court of appeals quite understandably held that "An employer must do what it can to prevent outrageous conduct arising from the employment relationship, and must respond swiftly and effectively to complaints of such conduct." Id. at 382, 504 S.E.2d at 432.

In this case, the officials at FCI Morgantown learned of Coger's alleged misconduct on May 17, 2001. They reported the allegations to OIA the next day. The OIA then referred the matter to the OIG, which commenced its investigation two weeks later in June 2001. (Id.) The matter was fully investigated over the next three months, a sting operation was then conducted, and Coger was arrested on September 7, 2001. The dissimilarity between Travis and this action is profound.

Second, plaintiffs seize on Travis' supposed reformulation of the Musgrove rule:

> We have generally accepted the proposition that an employer may be liable for the conduct of an employee, even if the specific conduct is unauthorized or contrary to express orders, so long as the employee is acting within his general authority and for the benefit of the employer.

Id. at 381, 504 S.E.2d at 431 (emphasis supplied). Plaintiffs contend that "Coger testified that in all his interaction with the plaintiffs, he was attempting to serve the United States, and the threats he made. . . were within his general authority." (Pls.' Resp. at 20). Taking Coger's testimony as true, it is insufficient to raise a genuine issue of material fact. From a purely objective standpoint, Coger's extortion attempts and outrageous misconduct in no way benefited his employer. Indeed, when FCI Morgantown learned of his unlawful acts, it responded promptly.

Coger's intentional infliction of emotional distress on plaintiffs occurred entirely outside the scope of his BOP employment. The court, accordingly, ORDERS that the government's second motion to dismiss, insofar as it seeks summary judgment, be, and it hereby is, granted as to Count I. The court further ORDERS that Count I be, and it hereby is, dismissed insofar as it relates to the government.

III.

Based upon the foregoing, the court ORDERS that the government's second motion to dismiss, inclusive of its summary judgment component, be, and it hereby is, granted on the grounds explicitly addressed herein. The court further ORDERS that

Count I of the first amended complaint, insofar as it relates to the government, and Count If, in its entirety, be, and they hereby are, dismissed.

Inasmuch as all counts against the government have been dismissed, the court ORDERS that the remaining motion to dismiss plaintiffs' punitive damage claim be, and it hereby is, denied without prejudice.

The Clerk is directed to file this written opinion and order under seal and to forward copies to all counsel of record and to William D. Coger, Jr. at his last known address.

DATED: May 17, 2006

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

JOHN STEVEN LEROSE, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
et al.,
Defendants.

Civil Action No. 2:03-2372
Judge John T. Copenhaver, Jr.
[Entered: May 17, 2006]

INTEGRATED PRETRIAL ORDER

Pursuant to Rule 16 of the Federal Rules of Civil Procedure, Rule 2.04 of the Local Rules of Civil Procedure, and the Scheduling Order previously entered by the Court, the parties submit the following integrated pretrial order to the Court:

1. RULE 26(a)(3) PRETRIAL DISCLOSURES .AND OBJECTIONS

Plaintiffs

(A) WITNESSES

Witnesses Expected To Testify

1. William Coger, Jr.
2. Ronald Amati
3. Steve LeRose
4. Rebecca LeRose-Sweeney
5. Frank Gigliotti
6. Eugene Connelly
7. Kevin Kiddy
8. James Link
9. John LaManna
10. Bryan Bledsoe
11. Jeffrey Hammond
12. Terry Raudebaugh
13. Deborah Livingston
14. Raymond Briggs
15. Patti Stelzer
16. Timothy Thistlethwaite, M.D.
17. Howard Painter

Witnesses Whom May Be Called To Testify If Need Arises

Witnesses identified by any other party.

(B) WITNESSES TO BE PRESENTED BY DEPOSITION TESTIMONY

Any of the above who have been deposed and are unavailable at trial.

(C) EXHIBITS

Exhibits Expected To Be Offered

1. Touhy Statement of Eric Snyder Re: Kevin Kiddy.
2. FBI - Investigation Morgantown - Gun - File #3 Bates Nos. FBI-3-000I through FBI-3-0041.
3. FBI - Elkton Investigation - File #1 Bates Nos. FBI-I-0001 through FBI-1-0066
4. Touhy Statement of Eric Snyder Re: Jatnes Link.
5. Bureau of Prisons Office of Investigations (OIA) Investigative File Concerning Fonner Employee William D. Coger, Jr. - File #5 Bates Nos. OIA 99-4489-0001 through 99-4489-0026
6. OIG - Investigations Division – IDMS Bates Nos. OIG-0004 through OIG-0008
7. Touhy Statement of Eric Snyder Re: John LaManna
8. List of Positions Held by John LaManna
9. Complete Personnel File of William D. Coger, Jr. Bates Nos. Coger-P-0001 through Coger-P-OI 03
10. Touhy Statement of Eric Snyder Re: Jeffrey Hammond, Ph.D.
11. Touhy Statement of Eric Snyder Re: Raymond (Ray) Briggs
12. U. S. Department of Justice, Federal Bureau of Prisons Program Statement - Standards of Employee Conduct Bates Nos. BOP-0045 through BOP-0063
13. Touhy Statement of Eric Snyder Re: Terry Raudebaugh

14. 5/xx/Ol Letter to William D. Coger, Jr. From D. Livingston Bates Nos. BOP-OI04 through BOP-Ol 05
15. 10/xx/Ol Letter to William D. Coger, Jr. From Charles L. Lockett Bates Nos. BOP-0093 through Bates Nos. BOP-0095
16. 9/13/01 E-mail From Constance Jodon to Bryan Bledsoe Re: Delayed Adverse Action - Coger; Bates No. BOP-l 06
17. Touhy Statement of Eric Snyder Re: Deborah Livingston
18. 09/13/01 Letter to William D. Coger, Jr. From D. Livingston Bates No. BOP-0030
19. Touhy Statement of Eric Snyder Re: Bryan Bledsoe
20. Biography - Bryan A. Bledsoe
21. Documents Produced by Government at Deposition of Patti Stelzer
22. Application of William D. Coger, Jr. Bates Nos. COGER-P-00049 through COGER-P-0056 and COGER-P-0045
23. Optional Application for Federal Employment Bates Nos. COGER-P-00062 through COGER-O-00063 and COGER-P-0031
24. Declaration for Federal Employment Bates Nos. COGER-P-00059 through COGER-P-00060
25. Summary of Findings of the Pre-Employment Interview Bates Nos. COGER-P-00081 through COGER-P-00096
26. Appointment Affidavits Bates No. COGER-P-0028

27. Statement of Prior Federal Service Bates Nos. COGER-P-0023 through COGER-P-0024
28. Declaration for Federal Employment Bates Nos. COGER-P-0026 though COGER-P-0027
29. Case Closing Transmittal (06/11/98) Bates Nos. COGER-P-0048; COGER-P-00067 through COGER-P-00068; COGER-P-00065 through COGER-P-00066; COGER-P-0069; COGER-P-00071; COGER-P-00070; COGER-P-0072 through COGER-P-0073; COGER-P-0019; COGER-P-0075 through COGER-P-0077; COGER-P-00078 through COGER-P-00080; COGER-P-0074; COGER-P-00064
30. Agency Infonnation for OPM Background Investigations Bates Nos. COGER-P-0057
31. Report of Agency Adjudicative Action on OPM Personnel Investigations
32. FBI - Morgantown Extortion Investigation - File #2 Bates Nos. FBI-2-0001 through FBI-2-0094
33. OIG - Morgantown Investigation File Involving William D.Coger, Jr. - File #4; Bates Nos. OIG-OOOI through OIG-0379
34. FCI Morgantown (Extortion) Bates Nos. OIA 01-2204-0001 through OIA 01-2204-0269
35. FCI Morgantown (Visiting Room) Bates Nos. OIA 01-1756-0001 through 01-1756-0072
36. BOP Disciplinary File Regarding William D. Coger, Jr. - File #6 Bates Nos. BOP-OOOI through BOP-0254

Exhibits That May Be Offered

Exhibits identified by any other party.

(D) OBJECTIONS

None listed by the plaintiffs.

Defendant United States of America

(A) WITNESSES

Witnesses Expected to Testify

The United States expects to call the following witnesses at trial:

1. Brian Bledsoe, Warden
   U.S.P. Marion
   4500 Prison Road
   Marion, IL 62959
   (618) 964-1441
2. John LaManna, Warden
   FCI Edgefield
   501 Gary Hill Road
   Edgefield, SC 29824
   (803) 637-1500
3. Jeffrey A. Hammond, Ph.D.
   USP - Hazelton
   P. O. Box 450
   Sky View Drive
   Bruceton Mills, WV 26525
   (304) 379-5000

4. Raymond Briggs
   FCI Cumberland
   Federal Correctional Institution
   P.O. Box 1000
   Cumberland, Md 21501
   (301) 784-1000
5. Constance Jodon, Fonner Human Resource Manager, FCI
   Morgantown
   c/o Marian Callahan
   Assistant Regional Counsel
   United States Bureau of Prisons
   Mid-Atlantic Regional Office
   10010 Junction Drive
   Annapolis Junction, MD 20701
   (301)317-3121
6. Kevin Kiddy, Unit Manager
   FCI Petersburg
   P. O. Box 90042
   Petersburg, VA 23804
   (804) 504-7200
7. Mickey Pinner
   HumanResource Administrator
   United States Bureau of Prisons
   Mid-Atlantic Regional Office
   10010 Junction Drive
   Annapolis Junction, MD 20701
   (301) 317-3194
8. Deborah Livingston
   Disciplinary Hearing Officer
   FCI Gilmer
   P. O. Box 5000
   Glenville, WV 26351
   (304) 462-0395

9. Terry Raudebaugh
   Special Investigative Agent
   USP - Hazelton
   P. O. Box 450
   Sky View Drive
   Bruceton Mills, WV 26525
   (304) 379-5000
10. Denise Gottleib, Former Paralegal Specialist
    c/o United States Bureau of Prisons
    Mid-Atlantic Regional Office
    10010 Junction Drive
    Annapolis Junction, MD 20701
    (301) 317-3128
11. James Link
    Special Investigative Agent
    USP, Big Sandy
    Inez, KY
    (606) 433-2400
12. Patti Stelzer
    Deputy Chief, SBIS
    4211 Cedar Springs Road, Suite 200
    Dallas, TX 75219
(214) 224-3580

Witnesses Whom May Be Called To Testify If Need Arises

1. Special Agent Ronald E. Helmick
   Federal Bureau of Investigation
   904 Sahara Trail
   Suite 3
   Youngstown, OH 44514
   (330) 965-2940

2. Special Agent Mark Pendleton
   Office of the Inspector General
   United States Department of Justice
   Washington Field Office
   1300 N. 17th Street
   Suite 3200
   Arlington, VA 22209
   (202) 616-4736
3. Special Agent James Watson
   320 West Pike Street
   Suite 310
   Clarksburg, WV 26301
   (304) 624-6200
4. The United States may call other persons as witnesses who have been disclosed in the United States' responses to plaintiffs' discovery requests and in documents provided to plaintiffs during the course of discovery should any issues or questions arise during the course of the trial which cannot be adequately answered by the United States' witnesses likely to testify at trial. The United States may also call any witnesses listed by the other parties.

(B) WITNESSES TO BE PRESENTED BY DEPOSITION TESTIMONY

The United States anticipates that all of its witnesses will testify live at trial. If the trial date should change or other unforeseen circumstances occur, then some of the witnesses expected to testify live at trial may have their testimony presented through deposition testimony.

(C) EXHIBITS

Exhibits Expected To Be Offered

1. Plaintiffs' SF 95 Claim Forms (with attachments submitted by Plaintiffs).
2. Plaintiffs' conviction records.
3. Plaintiffs' medical records.
4. Plaintiffs' BOP records.
5. William Coger's personnel file as maintained by OPM.
6. William Coger's OPM background investigation file.
7. William Coger's records from the BOP Training Center at Glynco, Virginia.
8. Personnel policies of the BOP produced during discovery and attached as exhibits to the United States' Motion To Dismiss And/Or Motion For Summary Judgment and as exhibits to the Declarations filed in support of the United States' Motion To Dismiss And/Or Motion For Summary Judgment.
9. Other policies of the BOP disclosed during discovery.
10. BOP\SBIS computer records regarding William Coger and other documents produced at the deposition of Patti Stelzer.
11. Guidelines Of Acceptability For Bureau of Prisons' Job Applicants (Revised March 1996).

Exhibits That May Be Offered

Defendant United States may, if needed, offer the following exhibits:

1. Official pleadings and records from Wilson v. Bureau of Prisons, et al., Civil Action No. 4:00CV00295, (or excerpts thereof) which was filed in the United States District Court for the Northern District of Ohio, Eastern Division, on February 1, 2000.
2. Investigative file of the FBI (or excerpts thereof) regarding allegations of extortion by William Coger at FCI Elkton (as produced and limited by the protective order entered by the Court with redactions as required by federal law and pursuant to applicable legal privileges).
3. Investigative file of the FBI (or excerpts thereof) regarding allegations of extortion by William Coger at FCI Morgantown (as produced and limited by the protective order entered by the Court with redactions as required by federal law and pursuant to applicable legal privileges).
4. Investigative file of Terry Raudebaugh (or excerpts thereof), SA for the BOP (as produced and limited by the protective order entered by the Court with redactions as required by federal law and pursuant to applicable legal privileges).
5. Investigative file of the FBI (or excerpts thereof) regarding a gun found at FCI Morgantown (as produced and limited by the protective order entered by the Court with

redactions as required by federal law and pursuant to applicable legal privileges).

6. Office of Inspector General file (or excerpts thereof) regarding allegations of extortion by William Coger at FCI Morgantown (as produced and limited by the protective order entered by the Court with redactions as required by federal law and pursuant to applicable legal privileges).
7. Depositions (or excerpts thereof) of all persons deposed during discovery in this case.
8. Transcripts of the testimony (or excerpts thereof) of the plaintiffs and other witnesses at the criminal trial involving William Coger in the United States District Court for the Northern district of West Virginia.
9. Disciplinary files (or excerpts thereof) of William Coger (as produced and limited by the protective order entered by the Court with redactions as required by federal law and pursuant to applicable legal privileges).
10. OIA files (or excerpts thereof) (as produced and limited by the protective order entered by the Court with redactions as required by federal law and pursuant to applicable legal privileges).
11. All documents produced during discovery (and depositions) or pursuant to the protective order entered by the Court (subject to the terms of the protective order with redactions as required by federal law and pursuant to applicable legal privileges).
12. Declarations (including all exhibits attached thereto) filed in support of the United States Motions To Dismiss And/Or Summary

Judgment previously filed with the Court in this civil action.

13. BOP regulations, policies, procedures, and guidelines necessary to rebut plaintiffs' claims and allegations.
14. Other federal laws, regulations, procedures, and guidelines necessary to rebut plaintiffs' claims and allegations.
15. Any documents or exhibits introduced by the other parties at trial.

(D) OBJECTIONS

The United States may serve motions in limine in advance of trial, and the United States reserves its objections to the relevancy and admissibility of the testimony of plaintiffs' witnesses and to plaintiffs' exhibits and other evidence. The United States does object to the testimony of plaintiffs' expert, Howard Painter, because he is not qualified to testify as to the opinions disclosed by him in his Fed.R.Civ.P. 26(a)(2) report and in his deposition testimony. In addition, his testimony is not admissible under the criteria set forth in Fed.R.Evid.702. The United States also objects to the introduction of "Touhy Statements" by plaintiffs because such documents are irrelevant and inadmissible. The United States also objects to the use of any grand jury materials pursuant to Fed.R.Crim.P. 6(e).

Defendant William Coger

(A) WITNESSES

Witnesses Expected To Testify

1. William Coen.
2. Eric Lathrop.
3. Barb Demcisak.
4. Gary DeTemple.
5. Eric Wenski.
6. Patrick Armstrong.
7. Brook Ebrecht.
8. Eric Wensko.
9. Phil Manglitz.
10. John Black.
11. Kim Grosselin-Baldwin.
12. Alan Heldreth.
13. Jill Heldreth.
14. Joe Pyle.
15. David Carpenter.
16. Mark Percival.
17. Wilda Coger.
18. Tammy Herring.
19. Mike Briggs.
20. Local Navy recruiter from Charleston, WV.
21. Fire Chief from Mt. Morris, PA.
22. James Wycoff.
23. Matthew A. Victor.
24. James Lewis.
25. Representative from Community Bank of Waynesburg, PA.
26. Linda Lewis-Collins.
27. Joan Mooney.

Witnesses Whom May Be Called To Testify If Need Arises

Defendant William Coger may call any of the witnesses listed by the other parties as witnesses at trial.

(B) WITNESSES TO BE PRESENTED BY DEPOSITION TESTIMONY

Defendant William Coger anticipates that all of his witnesses will testify live at trial. If conditions change, he may present the testimony of some of his witnesses by deposition.

(C) EXHIBITS

Exhibits Expected To Be Offered

1. Excerpts from the transcript of the criminal trial involving defendant William Coger.
2. Master Agreement between the federal Bureau of Prisons and the Union representing Corrections Officers.
3. Grand jury transcripts involving criminal proceedings regarding William Coger.

Exhibits That May Be Offered

1. Any documents produced during discovery by any of the parties.
2. Any exhibits introduced at trial by the other parties.

(D) OBJECTIONS

Defendant William Coger objects to the introduction of any documents and any testimony relating to his military service, including his military background and any information concerning his duties and actions while in military service. Defendant William Coger objects to any opinions by Howard Painter against defendant Williatn Coger.

2. CONTESTED ISSUES OF LAW REQUIRING A RULING BEFORE TRIAL

Plaintiffs

(a) Which party - the Plaintiffs or the United States - bears the burden of proving that the "'discretionary function exception" either applies or does not apply?
(b) Does the "'discretionary function exception" bar, in all cases, claims of negligent hire, retention, or supervision of a federal employee?
(c) Can the United States be vicariously liable for the tort of Intentional Infliction of Emotional Distress committed by Defendant Coger?

Defendant United States

The defendant's motion to dismiss and/or for summary judgment is currently pending before the Court and raises certain legal issues which must be ruled upon before the trial date scheduled in this matter. In addition, the United States may file some motions in limine in

advance of trial which may require rulings by the Court prior to the trial. The Court needs to also decide whether Ronald Amati is an actual party before the Court in this civil action prior to the start of the trial.

Defendant William Coger

Defendant Coger's motions which are presently pending before Judge Copenhaver.

3. STATEMENT OF ESSENTIAL ELEMENTS

Plaintiffs

(a) On Count I - Intentional Infliction of Emotional Distress (Against Both Defendants):

(1) Coger intended to cause each of the plaintiffs to suffer severe and extreme emotional distress.
(2) In all his interactions with the Plaintiffs, Coger was attempting to do his job and serve the United States.
(3) Coger caused each of the plaintiffs to suffer extreme emotional distress by, among other things, threatening to throw Messrs. LeRose, Gigliotti, and Connelly in the SHU, harassing and threatening Mr. LeRose's daughter, Mr. Connelly's wife, and other members of Plaintiffs' families, invading and scattering Messrs. LeRose, Gigliotti, and Connelly's belongings, attempting to extort money and other things of value froln Plaintiffs, and

threatening Ms. LeRose-Sweeney by implying that he would throw her father in the SHU if she resisted his romantic advances.

(4) Coger's conduct was outrageous and exceeded all bounds of decency to the extent that Plaintiffs could not be expected to endure it in a civilized society.

(5) As a direct and proximate result of Coger's intentional conduct, Plaintiffs have suffered harm for which they are entitled to recover.

Syl. Pt. 6, Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692 (W.Va. 1982).

(b) On Count II - Negligent Hire, Retention, and Supervision (Against the United States):

(1) The United States owed Plaintiffs a duty not to expose them to corrections officers it knew or should have known would prey on them.

(2) The United States breached that duty by hiring, retaining and failing to adequately supervise Officer Coger when it knew or should have known of his mental instability, dangerous propensities and violations of Bureau of Prisons policy and law.

(3) The Plaintiffs suffered harm as a direct and proximate result of the Bureau of Prisons' breach of its duty.

Thompson v. McGinnis, 465 S.E.2d 922,928-29 (W.Va. 1995).

(c) On Count III - Deprivation of Civil Rights (Against Coger):

(1) Defendant Coger engaged in conduct that, at a minimum, constituted a conscious and callous indifference to the rights of the Plaintiffs.

(2) Coger's behavior in exploiting Mr. LeRose's claustrophobia, and Mr. Gigliotti's heart problems and claustrophobia, and Mr. Connelly's age, all conditions of which Coger was aware, his assault and battery on Mr. Connelly, his acts of extortion and attempted extortion, and his other outrageous conduct rose to a level repugnant to the conscience of mankind.

(3) As a direct and proximate result of Coger's outrageous conduct, plaintiffs LeRose, Connelly, Gigliotti, and Amati have suffered harm for which they are entitled to recover.

42 U.S.C. § 1983.

Defendant United States

1. Plaintiffs are required to prove that this Court has jurisdiction over the subject matter pursuant to the provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671, et seq.
2. The plaintiffs must prove that the United States has waived its sovereign immunity over their claims asserted in this case.

3. Plaintiffs must prove that they have complied with the administrative tort procedures imposed by the FTCA.
4. Plaintiffs must prove that their claims are not time barred by the two-year statute of limitations contained in 28 U.S.C. §2401.
5. Plaintiffs must prove that their claims are not barred by the discretionary function exception to the FTCA, 28 U.S.C. §2680(a).
6. Plaintiffs must prove that their claims are not barred by the exemptions to the FTCA contained in 28 U.S.C. §2680(h).
7. Even if plaintiffs' claims are viable under the FTCA, which the United States expressly denies, the plaintiffs must prove proximate causation to a reasonable degree of probability or reasonable degree of certainty depending upon the type of claims being asserted.
8. Even if the plaintiffs are ultimately found to be entitled to damages, which the United States expressly denies, plaintiffs must still prove their claims of damages by a reasonable degree of probability or a reasonable degree of certainty, depending upon the type of damage claim involved.
9. Plaintiffs must prove that their claims are not barred because they are essentially claims asserted under Bivens v. Six Unknown Federal Bureau of Narcotics Agents, 403 U.S. 388 (1971). The United States cannot be held vicariously liable for Bivens claims under federal law.
10. Even if the plaintiffs' tort claims are viable under the FTCA, which the United States expressly denies, plaintiffs must prove that the

United States is vicariously liable for co-defendant William Coger's alleged misconduct under federal law and West Virginia's applicable legal standards.

11. Even if the plaintiffs' tort claims are viable under the FTCA, which the United States expressly denies, plaintiffs must prove that the United States was negligent in hiring, supervising, and retaining William Coger as a corrections officer.
12. Even if the plaintiffs' tort claims are viable under the FTCA, which the United States expressly denies, plaintiffs must prove that the conduct of the United States was so outrageous as to meet the requirements for the tort of intentional infliction of emotion distress under applicable federal and West Virginia legal standards.
13. Plaintiffs must prove that 42 U.S.C. § 1983 is applicable to the facts of this case.
14. Even if the plaintiffs' tort claims are viable under the FTCA, which the United States expressly denies, plaintiffs must prove the requisite elements of liability, proximate causation, and damages.

Defendant William Coger

The plaintiffs must prove liability, proximate causation, and damages. Defendant William Coger denies that he is liable to the plaintiffs and further denies that he proximately caused any injury to the plaintiffs and also denies that the plaintiffs are entitled to damages from him.

4. BRIEF SUMMARY OF MATERIAL FACTS AND THEORIES OF LIABILITY OR DEFENSE

Plaintiffs

Plaintiffs LeRose, Connelly, Gigliotti, and Amati were all convicted of various federal crimes and sentenced to confinement at the Federal Correctional Institution at Morgantown, West Virginia ("FCI Morgantown"). Plaintiff LeRose-Sweeney is Mr. LeRose's daughter, who visited her father while he was incarcerated. All the Plaintiffs had the misfortune of encountering Defendant William Coger ("Coger"), then a corrections officer at FCI Morgantown. As a corrections officer, Coger wielded nearly unlimited power over the incarcerated Plaintiffs, and made that power (and his willingness to misuse it) known to them and to Ms. LeRose-Sweeney.

Coger, employed by the BOP as a result of the BOP's knowledge, or willful blindness, of his criminal propensities and mental instability, hatched a plan to extort money and property from the incarcerated Plaintiffs, and sexual favors from Ms. LeRose-Sweeney. Coger began executing his scheme in the fall of 2000 and continued for about a year, until he was arrested in a sting operation in which Plaintiffs LeRose and Connelly wore wires to record Officer Coger's attempted extortion.

During the hiring process, The BOP ignored the obvious red flags that Coger had been subject to a

summary court martial and sentenced to 21 days in the brig for passing bad checks, that the Navy remarked that he had no potential for continued service, and that he lied numerous times on his application forms. The BOP claims to have destroyed numerous records from Coger's background investigation in September 2003, after Plaintiffs made their administrative claim against the United States, but before they filed suit.

While Coger was employed at the BOP, officials at FCI Elkton admitted to transferring Coger to FCI Morgantown while an investigation - into alleged extortion from an inmate's family - was still open. A few months after arriving at FCI Morgantown, Coger "found" a loaded pistol inside the compound. Numerous management-level personnel there, including the warden, believed that Coger had planted the pistol to gain recognition. Coger also played an "April Fools" prank on an inmate at FCI Morgantown by calling him to the visiting room when no visitor was present, then lied during the BOP's investigation of the incident. BOP personnel actually drafted, but never sent, a letter firing Coger as a result.

Plaintiffs filed this case against the United States based both on the Government's own negligence in hiring, retaining and supervising Officer Coger, and on its vicarious liability for Coger's tort of outrage. Either theory provides for essentially identical damages. Plaintiffs have

sued Defendant Coger for the tort of outrage and for deprivation of civil rights.

As a defense, the United States contends that the "discretionary function exception" to the Federal Tort Claims Act vitiates any liability it might have for negligent hire, retention and supervision. The United States believes that no such claim exists, because, the argument goes, the Bureau of Prisons ("BOP") had discretion over whether to hire Coger; how, if at all, to supervise him; and when, if ever, to fire him. The BOP's own regulations, and the testimony of the BOP's representative on personnel issues belie that point, because the BOP has -- but failed to follow -- a clear set of rules governing the hiring process. In hiring Coger, the Government breached its mandatory duties. In retaining him, the Government improperly overlooked the fact Coger was preying on inmates. The Government's position is that it has discretion to retain any employee, no matter how craven or vicious. The law does not support that position.

As for the United States' vicarious liability, Coger testified at deposition that he was attempting to serve the government and do his job in all his interactions with the Plaintiffs.

Defendant United States

Plaintiffs John Steven LeRose, Frank Gigliotti, and Eugene Francis Connelly were convicted felons who were formerly incarcerated at the federal prison located in Morgantown ("FCI

Morgantown"), West Virginia. LeRose was imprisoned for defrauding a financial institution and filing a false tax return. Gigliotti had been convicted of mail fraud, extortion under color of official right, attempted extortion under color of official right, and making and subscribing to a false tax return. Connelly had been convicted of making and subscribing to false income tax returns. Ronald Amati had been convicted of various crimes as well. Rebecca Lauren LeRose-Sweeney is the daughter of John Steven LeRose.

Co-defendant William Coger is a former correctional officer who worked at FCI Morgantown. Coger successfully completed a background check and originally started duty as a correctional officer at FCI Elkton in Elkton, Ohio, on March 3, 1998. He received promotions at FCI Elkton in 1999 and 2000. He received performance evaluations at FCI Elkton which were satisfactory in 1998 and 1999. He received an "exceeds" satisfactory performance rating in 2000.

Coger resided with his then wife in Mt. Morris, Pennsylvania. His home was located approximately two hours (driving time) from Elkton, Ohio, and approximately ½ hour (driving time) from Morgantown, West Virginia. As a result of his long commute to FCI Elkton, he often had to be apart from his wife. Coger requested a transfer on several occasions to FCI Morgantown so that he could work closer to his home. However, no openings occurred at FCI Morgantown for a considerable period of time.

An opening occurred at FCI Morgantown in 2000 and Coger's request for a transfer was considered. Since experienced correctional officers are preferred, Coger's performance ratings had been favorable, and Coger had been given favorable recommendations from the Warden at FCI Elkton and Coger's supervisor at that facility, Warden Bledsoe of FCI Morgantown decided to fill the vacancy at FCI Morgantown with Coger. Coger initially performed well at FCI Morgantown and received an "exceeds" satisfactory performance rating in March of 2001.

On April 1, 2001, an incident occurred at the visiting area at FCI Morgantown. An inmate was allegedly called to the visiting area by Coger to see a visitor. When the inmate arrived, he was informed that he had no visitor waiting for him. Allegedly, Coger made this call as some form of "April Fool's" prank. The matter was investigated by Terry Raudebaugh and the matter went to Warden Bledsoe and labor relations for review. Warden Bledsoe did not believe that Coger could be terminated for the incident, and a decision to hold disciplinary proceedings regarding the incident was made when the incidents involving the plaintiffs in this case came to Warden Bledsoe's attention. At that point, Warden Bledsoe determined that the matter involving the plaintiffs' claims of extortion had to take precedence.

On May 17 and May 21, 2001, plaintiff LeRose first reported to Dr. Jeffrey Hammond, prison psychologist, that he was being pressured by

Coger. Dr. Hammond immediately reported this complaint to Warden Bledsoe. Warden Bledsoe referred the matter to the Office of Internal Affairs at the Bureau of Prisons on May 18, 2001. The Office of Internal .... Affairs (OIA) of the BOP then referred the matter to the Office of the Inspector General (OIG) of the Department of Justice. OIG began its investigation within two weeks of receiving the referral. OIG interviewed LeRose on June 4, 2001, and received information regarding LeRose's complaints. The investigation by OIG continued and included subsequent complaints by plaintiffs Connelly and Gigliotti. LeRose also complained on May 21,2001 that his daughter, plaintiff LeRose-Sweeney, was being harassed by Coger.

OIG's investigation continued and plaintiffs LeRose and Connelly wore "wires" which recorded their conversations with Coger. Based on the results of the investigation, Coger was arrested on September 7,2001, at FCI Morgantown and suspended from service. Coger was placed on indefinite suspension from employment on September 28, 2001, pending the results of the criminal proceedings. Coger went on trial in February, 2002, and was convicted on February 14, 2002, for using his employment to try to extort money and favors from prison inmates. He was sentenced to 41 months in prison on June 14, 2002.

None of the plaintiffs who were inmates at FCI Morgantown ever pursued an administrative remedy complaining of the alleged misconduct of

any staff member at FCI Morgantown while they were still inmates at FCI Morgantown. Plaintiff Rebecca Lauren LeRose-Sweeney also did not express her concerns with the administration at FCI Morgantown. Rather, all of the plaintiffs filed FTCA administrative claims with the BOP long after the five inmate plaintiffs were released from their incarcerations and defendant Coger had been criminally prosecuted. Plaintiffs contend that defendant Coger committed intentional infliction of emotional distress upon them "by attempting to extort and extorting money and other property from each of them." Specifically, plaintiffs contend that defendant Coger demanded a truck, money, employment, and football tickets. Plaintiffs also contend that defendant Coger harassed and threatened plaintiff Rebecca Lauren LeRose-Sweeney, daughter of Plaintiff John Steven LeRose, plaintiff Connelly's wife, and engaging in other acts designed to harass and ridicule the plaintiffs who were inmates at FCI Morgantown. The plaintiffs contend that the "United States is vicariously liable for Coger's intentional conduct, because Coger acted within the scope of his employment." The plaintiffs have also asserted a separate "'Deprivation of Civil Rights · Cruel and Unusual Punishment" claim solely against defendant Coger.

The United States contends that plaintiffs' claims should be dismissed Coger clearly acted beyond the scope of his employment as a correctional officer and was taking improper actions based on his own purely personal motives. The United

States is not vicariously liable for such misconduct under West Virginia and federal law. Moreover, the plaintiffs' claims are, in reality, Bivens claims, and the United States cannot be held vicariously liable for such claims as indicated by clearly established federal law. In addition, the plaintiffs' theories of negligent hiring, supervision, and retention are clearly barred by the discretionary function exception to the FTCA. The plaintiffs' claims are also barred by the FTCA's exceptions found in 28 U.S.C. § 2680(h) because the plaintiffs' claims are based upon an alleged tort of extortion, which is one of the types of torts for which Congress did not waive sovereign immunity.

Finally, many of the plaintiffs' claims are barred by the statute of limitations applicable to them under the FTCA. Accordingly, the United States contends that the plaintiffs' claims against the United States are without merit and should be denied.

Even if the plaintiffs' claims could overcome these jurisdictional and sovereign immunity barriers, which they cannot, it is clear from the facts of this case that the Bureau of Prisons and affiliated federal agencies followed the appropriate statutory, regulation, and agency guidelines and procedures in hiring William Coger. Moreover, the Bureau of Prisons acted appropriately in supervising and retaining William Coger. Complaints against him were properly investigated by the appropriate federal agencies, taking into account applicable federal

employment laws and policies as well as William Coger's employment, constitutional, and legal rights under federal law. The Bureau of Prisons could not suspend William Coger or terminate him until charges ofmisconduct against him were properly substantiated. The past claims which plaintiffs claim should have provided notice to the Bureau of Prisons that William Coger should have been terminated were not substantiated as required by federal employment laws and policies applicable to his employment with the Bureau of Prisons. When the plaintiffs' claims against William Coger were found to be substantiated, the Bureau of Prisons took appropriate action in accordance with federal employment laws and policies when that agency suspended him and eventually terminated him. Thus, even if plaintiffs could pursue negligence or other tort claims against the United States, it is clear that the United States was not negligent or guilty of any actionable misconduct under applicable federal law and/or the FTCA.

Defendant William Coger

Defendant William Coger denies that he committed any wrongdoing against the plaintiffs, and he further denies that he is liable to them, proximately caused them any injuries, and/or owes them any money for damages. Defendant Coger denies the factual allegations asserted against him by the plaintiffs.

5. CONTESTED ISSUES OF FACT

Plaintiffs

(a) Did the government know, or should it have known, that Coger was unfit for and dangerous in the position of corrections officer?

(b) Did hiring Coger as a corrections officer, given the results and findings of the BOP interview process, violate any mandatory standards, regulations, public policy considerations or laws?

(c) Did BOP Personnel allow Coger to transfer from FCI Elkton to FCI Morgantown while the investigation ofhis alleged extortion was still open, and did doing so violate any mandatory standards, regulations, public policy considerations or laws?

(d) Did retaining Coger (or allowing him to have direct contact with inmates) after suspecting that he brought a gun into FCI Morgantown to gain recognition, and suspecting that he burned his own house to recover insurance proceeds, violate any mandatory standards regulations, public policy considerations or laws?

(e) Did retaining Coger (or allowing him to have direct contact with inmates) after learning that he lied to BOP investigators during the investigation of his "April Fools" prank, violate any mandatory standards regulations, public policy considerations or laws?

Defendant United States

1. Whether the United States violated any mandatory standards, regulations, policies, or laws in hiring, retaining, and supervising William Coger.
2. Whether the United States can be held vicariously liable for William Coger's conduct.
3. Whether plaintiffs' claims are barred by the applicable statute of limitations.
4. Whether the plaintiffs exhausted their administrative remedies

under the FTCA.

5. Whether the plaintiffs' claims are barred by the discretionary function exception to the FTCA.
6. Whether the plaintiffs' claims are barred by other exceptions of the FTCA.
7. Whether the United States has waived its sovereign immunity over the claims asserted by the plaintiffs in this case.
8. Even if the plaintiffs have a viable claim under the FTCA, which the United States expressly denies, whether the United States was negligent in hiring, supervising, and retaining William Coger as a corrections officer.
9. Even if the plaintiffs have a viable claim under the FTCA, which the United States expressly denies, whether the United States can be held vicariously liable for William Coger's conduct under applicable federal and West Virginia law.
10. Even if the plaintiffs have a viable claim under the FTCA, which the United States

expressly denies, whether the conduct of the United States was so outrageous as to meet the requirements for the tort of intentional infliction of emotion distress under applicable federal and West Virginia legal standards.

11. Even if the plaintiffs have a viable claim under the FTCA, which the United States expressly denies, whether the plaintiffs have proven viable claims for damages and that those damages, if any, were proximately caused by the United States.
12. Even if the plaintiffs have a viable claim under the FTCA, which the United States expressly denies, the extent of any damages to which the plaintiffs are entitled.

Defendant William Coger

Defendant William Coger denies all factual allegations asserted against him by the plaintiffs. He also denies that he is liable to the plaintiffs, that he proximately caused any injury to the plaintiffs, and that the plaintiffs are entitled to damages from him.

6. CONTESTED ISSUES OF LAW

Plaintiffs

See Plaintiffs' Section 2 and 3 above.

Defendant United States

See Defendant United States' sections 2, 3, and 5 above.

Defendant William Coger

Defendant William Coger contests the legal issues of liability, proximate causation, and damages in this case.

7. STIPULATIONS

Plaintiffs

(a) The Plaintiffs have asked, and the Government has agreed, to stipulate to the authenticity of all the documents the Government produced in discovery.
(b) Plaintiffs also ask the Government to stipulate that all documents it produced in discovery are government records and therefore not hearsay pursuant to F.R.E. 803(8), without the need for a records custodian to testify.
(c) Plaintiffs understand that counsel for the Government will accept trial subpoenas for the government witnesses who testified at deposition in this case.

Defendant United States

The Defendant United States will stipulate to the authenticity of the documents, governmental records, and exhibits it has already produced during discovery, reserving the right to object to their relevance and admissibility at trial. The Defendant United States reserves the right to object to the admissibility of the documents, records and other exhibits presented by the

plaintiffs during discovery and at trial based on substantive grounds, their relevancy, their content, and their authenticity and admissibility under the Federal Rules of Evidence.

Defendant William Coger

Defendant William Coger is willing to stipulate to the authenticity of various documents, governmental records, and exhibits produced during discovery in this case, but he reserves the right to contest their admissibility into evidence.

8. SUGGESTIONS FOR AVOIDANCE OF UNNECESSARY PROOF AND CUMULATIVE EVIDENCE

Plaintiffs

See Plaintiffs' Section 6 above.

Defendant United States

None.

Defendant William Coger

None.

9. SUGGESTIONS FOR ADOPTING SPECIAL PROCEDURES

Plaintiffs

Plaintiffs request that Defendant Coger be present, in person, for the entire trial.

Defendant United States

None.

Defendant William Coger

None.

10. SPECIAL VOIR DIRE QUESTIONS

Plaintiffs

None. Plaintiffs' claims against the United States will be tried to the Court. Plaintiffs are willing to discuss the possibility of withdrawing their jury demand against Defendant Coger.

Defendant United States

This section is not applicable to the United States since the FTCA bars any right to a jury trial, 28 U.S.C. §2402. The United States objects to a jury trial regarding any claims of the plaintiffs which may be applicable to the United States, directly or indirectly, because the United States has not waived its sovereign immunity to allow a jury trial.

Defendant William Coger

If the Court determines that this case will proceed to a jury trial for the claims asserted against defendant William Coger, then defendant William Coger will submit voir dire questions in advance of trial at a later date, or as necessary, at trial during the jury selection phase of the case.

11. ESTIMATED NUMBER OF TRIAL DAYS

Plaintiffs

Three, for Plaintiffs' case-in-chief.

Defendant United States

The United States estimates that the trial of this case will take 8-10 trial days.

Defendant William Coger

Defendant William Coger anticipates that the trial of this case will take 8-10 trial days.

12. OTHER MATTERS

Plaintiffs

None.

Defendant United States

The United States is not aware of any other matters which need to be addressed at this time.

Defendant William Coger

None at this time other than defendant Coger's motions pending before the Court.

Entered this 17th day of May, 2006.

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.

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No. 08-477

In the Supreme Court of the United States

JOHN STEVEN LEROSE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' tort suit against the United States, for negligent hiring, supervision, and retention of a Bureau of Prisons officer, is barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

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In the Supreme Court of the United States

No. 08-477

JOHN STEVEN LEROSE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unreported. The memorandum opinion and order of the district court (Pet. App. A13-A55) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2008. The petition for a writ of certiorari was filed on October 8, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the sovereign immunity of the United States and renders the United States liable in damages for the "negligent or wrongful act or omis-

sion of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable * * * in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Congress has expressly excluded from that waiver of liability a number of categories of cases, including any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." 28 U.S.C. 2680(a). As this Court has explained, that provision is designed "to prevent judicial second-guessing of legislative and administrative decisions * * * through the medium of an action in tort," and accordingly excepts from the FTCA's jurisdiction any official action that involves "an element of judgment or choice" and is "susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 322-323, 325 (1991) (internal quotation marks and citation omitted).

2. a. Following convictions for various offenses, all but one of the petitioners were incarcerated at a federal correctional facility in Morgantown, West Virginia.[1] Pet. App. A14-A15. Petitioners contend that during that period, William Coger, then a guard at the facility, attempted to extort money and property from them. *Id.* at A3. Coger was ultimately convicted for violating 18 U.S.C. 872, which prohibits extortion by an employee of the United States. Pet. App. A25.

Petitioners brought suit in federal district court against the United States under the FTCA, alleging that

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[1] The other petitioner is a daughter of one of the incarcerated petitioners. Pet. App. A15.

the Bureau of Prisons (BOP) had negligently hired, supervised, and retained Coger, and that the United States was vicariously liable for Coger's intentional infliction of emotional distress on petitioners. Pet. App. A2-A3. Following discovery, the United States moved to dismiss petitioners' FTCA claim under Federal Rule of Civil Procedure 12(b)(1) on the basis of the discretionary function exception, 28 U.S.C. 2680(a), and for summary judgment under Rule 56(c) on petitioners' vicarious liability claim on the basis of state law.[2]

b. The district court granted the motions. Pet. App. A13-A55. After noting that petitioners bore the burden of proof, *id.* at A31-A32, but drawing all reasonable inferences from the alleged facts in petitioners' favor, *id.* at A34, the district court held that Section 2680(a) barred petitioners' FTCA claim. See *id.* at A29-A48. The district court reasoned that "[c]ourts have repeatedly held that government employers' hiring and supervisory decisions are discretionary functions." *Id.* at A46 (quoting *Suter* v. *United States*, 441 F.3d 306, 312 n.6 (4th Cir.), cert. denied, 549 U.S. 887 (2006)). The court likewise granted summary judgment on petitioners' vicarious liability claim, holding that under governing state law, Coger's misconduct was "entirely outside the scope of his BOP employment." *Id.* at A54. On March 6, 2007, the court entered final judgment in favor of the United States pursuant to Federal Rule of Civil Procedure 54(b), and petitioners appealed. Pet App. A11-A12.

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[2] Petitioners also sued Coger himself in the same suit, alleging intentional infliction of emotional distress and a claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. A25. That portion of the suit remains pending in district court.

c. The court of appeals affirmed. Pet. App. A1-A10. It held that petitioners bore the burden of proving that the discretionary function exception did not bar their FTCA claim. *Id.* at A5-A6. The court of appeals further held that "government employers' hiring and supervisory decisions are discretionary functions," and concluded that "BOP's decisions regarding the hiring, supervision and retention of Coger are precisely the type of decisions that are protected under the discretionary function exception." *Id.* at A8. The court also affirmed the dismissal of petitioners' vicarious liability claim, holding that Coger's actions could not be imputed to the United States because they "were not designed to further the management and operation of the BOP but rather for [Coger's] own personal interests," and thus did not fall within the scope of employment. *Id.* at A10.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not merit further review. The discretionary function exception bars tort suits against the United States for any act "that involves choice or judgment" and is "susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991). The types of employment actions that form the basis of petitioners' FTCA claim fit squarely within that description. The courts of appeals consistently have held that Section 2680(a) bars suits against the United States over the hiring, retention, and assignment of federal officers—a conclusion that holds equally whether the burden for establishing the exception's applicability is placed on the government or on petitioners. Accordingly, any circuit conflict on the latter issue is not implicated here. In any event, because the exception would deprive the court of

subject-matter jurisdiction, the court of appeals correctly placed on petitioners the burden of proving that it did not apply. The petition for a writ of certiorari therefore should be denied.[3]

1. As the court of appeals explained, "BOP's decisions regarding the hiring, supervision and retention of Coger" are "precisely the type of decision[s] that Congress intended to shield from liability through the discretionary function exception" in the FTCA. Pet. App. A8. That conclusion is in accord with the precedent of the Fourth Circuit as well as the other courts of appeals. See, *e.g.*, *Suter* v. *United States*, 441 F.3d 306, 312 n.6 (4th Cir.), cert. denied, 549 U.S. 887 (2006); *Claude* v. *Smola*, 263 F.3d 858, 861 (8th Cir. 2001), cert. denied, 534 U.S. 1144 (2002); *Nurse* v. *United States*, 226 F.3d 996, 1001-1002 (9th Cir. 2000); *Burkhart* v. *Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997); *Richman* v. *Straley*, 48 F.3d 1139, 1146 (10th Cir. 1995); *Attallah* v. *United States*, 955 F.2d 776, 784 (1st Cir. 1992); *Radford* v. *United States*, 264 F.2d 709, 710-711 (5th Cir. 1959) (per curiam).[4]

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[3] Petitioners do not ask this Court to review the dismissal of their vicarious liability claim.

[4] Petitioners cite (Pet. 26) *Tonelli* v. *United States*, 60 F.3d 492 (8th Cir. 1995), for the proposition that certain claims of negligent hiring, supervision, and retention are not excluded by the FTCA's discretionary-function exception. The court in that case permitted supervision and retention claims to proceed on the narrow premise that the employer was on actual notice of the employee's illegal conduct on the job, such that retention decisions were no longer discretionary. See *id.* at 496. To the extent petitioners allege that similar, discretion-abrogating cir-

Those cases hold that the federal government's selection, supervision, and retention of its employees involve "an element of judgment * * * of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-323 (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)). As the court of appeals explained, such determinations "involve[] several public policy considerations including the weighing of the qualifications of candidates, weighing of the backgrounds of applicants, consideration of staffing requirements, evaluation of the experience of candidates, and assessment of budgetary and economic considerations." Pet. App. A8. That analysis, which turns on matters of agency policy, is exactly the sort that Congress intended to protect from "judicial 'second-guessing'" by enacting Section 2680(a). *Gaubert*, 499 U.S. at 323 (quoting *United States* v. *Varig Airlines*, 467 U.S. 797, 814 (1984)).

2. Petitioners acknowledge (Pet. 24) that "[t]his broad construction of the discretionary function exception * * * has become the norm," and do not ask this Court to intervene on that ground. Rather, they con-

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cumstances were present here, they essentially seek correction of the district court's contrary factbound determination (Pet. App. A32-A45).

Moreover, the court in *Tonelli* rejected the hiring claim and recognized that all such claims "generally involve the permissible exercise of policy judgment and fall within the discretionary function exception." 60 F.3d at 496. The Eighth Circuit also has made clear in subsequent cases that personnel decisions are "common example[s]" of activities involving discretionary policy judgments squarely covered by the FTCA's discretionary-function exception. *Claude*, 263 F.3d at 861; see, *e.g.*, *Red Elk* v. *United States*, 62 F.3d 1102, 1107 (8th Cir. 1995). Any intra-circuit conflict does not justify this Court's review, and, in any event, petitioners do not seek a writ of certiorari to resolve any purported conflict on the *scope* of the discretionary-function exception as applied to negligent hiring, supervision, and retention claims.

tend (Pet. 11-12) that the courts of appeals are divided over another issue—whether a plaintiff or the government bears the burden of establishing the applicability of the discretionary function exception. Although there appears to be some disagreement among the courts of appeals on that latter question (see Pet. 11), its resolution would not alter the outcome of this case.

Despite "extensive discovery" and "a complete factual record" (Pet. 3, 13), petitioners offered no evidence to establish a mandatory duty that would remove the BOP's employment actions from their ordinary classification as discretionary functions. Petitioners contend (Pet. 14) that the BOP failed to adequately investigate Coger in light of an "issue code" flag in his background investigation file, and that this "dispositive factual issue turn[s] entirely on which party bears the burden of proof." But petitioners' "issue code" argument was considered by the district court and rejected as "speculative and unreasonable," Pet. App. A36, despite the fact that the court expressly drew all reasonable inferences from the alleged facts in petitioners' favor, *id.* at A34. Petitioners do not explain how shifting the burden of proof to the government would matter given that the district court already gave them the benefit of all reasonable inferences from the factual allegations.[5]

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[5] It is also far from clear whether the BOP program statement referred to by petitioners (Pet. 7)—which states only that certain cases (based on a particular issue code) "will be forwarded through the regional director or assistant director to the [security and background investigation section]" (Pet. App. A34 n.9 (brackets in original))—would place any mandatory duty on the agency, even if petitioners had succeeded in establishing a viable inference that the issue code had been present in Coger's file.

Petitioners also suggest (Pet. 14, 28) that the BOP should not have permitted Coger to transfer to BOP's Morgantown facility before

Where, as here, petitioners have had full resort to discovery and have offered no viable evidence to establish a mandatory duty on the part of a federal agency, it is immaterial whether the government or petitioners bear the burden of establishing the applicability of the discretionary-function exception. Even decisions that place the ultimate burden on the United States to prove the application of the FTCA's exceptions recognize that "the plaintiff bears the burden of coming forth with sufficient evidence to establish there are genuine issues of material fact regarding the applicability of the discretionary function exception." *Miller* v. *United States*, 163 F.3d 591, 594 (9th Cir. 1998). Accordingly, in circumstances such as those present in this case, there is no conflict among the circuits. Dismissal is the appropriate result regardless of which party bears the burden of proof.

3. In all events, the court of appeals' analysis on the burden of proof issue is correct. Section 1346(b)(1), which waives the sovereign immunity of the United States and grants district courts subject-matter jurisdiction to adjudicate FTCA claims, is expressly "[s]ubject to the provisions of [28 U.S.C. 2671-2680]." 28 U.S.C. 1346(b)(1). Section 2680, in turn, provides that the provisions of the FTCA—and, in particular, the jurisdictional grant in Section 1346—"shall not apply to" claims falling within Section 2680's enumerated exceptions, including the discretionary function exception. 28 U.S.C. 2680. Those provisions, referred to elsewhere in the FTCA as "limitations and exceptions applicable" to "any action * * * pursuant to [S]ection 1346(b),"

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an ongoing investigation into alleged extortion by Coger had been formally concluded, but they point to no mandatory duty that would have prohibited such a transfer.

28 U.S.C. 2679(d)(4), constitute not only substantive limits on recovery but also restrictions on the FTCA's grant of jurisdiction to the federal courts.[6]

The burden of establishing that a case lies within a statutory grant of jurisdiction rests on the party invoking jurisdiction. See, *e.g.*, *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Here, that is petitioners. To place the burden instead on the United States, requiring it to disprove the existence of jurisdiction, would contradict the fundamental presumption that "a cause lies outside [federal courts'] limited jurisdiction" absent established evidence to the contrary. *Ibid.*

Petitioners appear to acknowledge (Pet. 16) that they would bear the burden of proof if "the discretionary function exception is treated as a prerequisite to subject matter jurisdiction." For the reasons discussed above, the text and structure of the FTCA compel precisely that conclusion. Petitioners suggest (Pet. 18) that Section 2680 cannot be jurisdictional because Congress enacted it as a separate provision from 28 U.S.C. 1346(b)(1), incorporating its limitations by mutual cross-

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[6] See, *e.g.*, *Medina* v. *United States*, 259 F.3d 220, 223-224 (4th Cir. 2001); *JBP Acquisitions, LP* v. *United States*, 224 F.3d 1260, 1263-1264 (11th Cir. 2000); *Tippett* v. *United States*, 108 F.3d 1194, 1196-1197 (10th Cir. 1997); *Richardson* v. *United States*, 943 F.2d 1107, 1112-1114 (9th Cir. 1991), cert. denied, 503 U.S. 936 (1992); *Fazi* v. *United States*, 935 F.2d 535, 537 (2d Cir. 1991); *Hydrogen Tech. Corp.* v. *United States*, 831 F.2d 1155, 1161, 1162 n.6 (1st Cir. 1987), cert. denied, 486 U.S. 1022 (1988); *Ford* v. *American Motors Corp.*, 770 F.2d 465, 466-467 (5th Cir. 1985); *Broadnax* v. *United States Army*, 710 F.2d 865, 866-867 (D.C. Cir. 1983) (per curiam); *Carlyle* v. *United States Dep't of the Army*, 674 F.2d 554, 556 (6th Cir. 1982); *Gibson* v. *United States*, 457 F.2d 1391, 1392 n.1 (3d Cir. 1972); *Konecny* v. *United States*, 388 F.2d 59, 62-63 (8th Cir. 1967); but see *Parrott* v. *United States*, 536 F.3d 629, 634-635 (7th Cir. 2008).

references in the two statutory sections. But where "Congress has enacted a separate provision that expressly restricts application of a jurisdiction-conferring statute," that choice does not alter the jurisdictional nature of the provision in question. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006).

Petitioners are thus incorrect in asserting (Pet. 17) that the discretionary function exception instead "should be viewed as the raising of affirmative defenses." Even *O'Toole* v. *United States*, 295 F.3d 1029 (9th Cir. 2002), on which petitioners rely (Pet. 17), recognizes that the FTCA exceptions in Section 2680 are jurisdictional. See *O'Toole*, 295 F.3d at 1033 ("Where an exception to the FTCA under [Section] 2680 applies, the United States has elected not to waive its immunity from suit, and courts are without jurisdiction over such claims."). Contrary to petitioners' assertion (Pet. 17), this Court's decisions in *Feres* v. *United States*, 340 U.S. 135 (1950), and *Gaubert*, 499 U.S. 315, do not suggest otherwise. *Feres* did not even involve the Section 2680 exceptions, and *Gaubert*, while properly recognizing that an FTCA claim cannot prevail if an exception applies, does not question the exceptions' jurisdictional effect. Indeed, the Court's analysis of the discretionary-function exception in *Gaubert* implies that a plaintiff has the burden of proving its applicability. See *id.* at 329-330. And elsewhere this Court has affirmed dismissals for lack of subject-matter jurisdiction based on the inapplicability of an FTCA exception under Section 2680. See, *e.g.*, *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 834 (2008); *Smith* v. *United States*, 507 U.S. 197, 199 (1993).[7]

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[7] This Court has also affirmed the dismissal of an FTCA claim for failure to state a claim based on the applicability of a Section 2680 ex-

Practical considerations (Pet. 20-28) do not support a different result. Petitioners' proposed rule would require the United States to disprove the existence of any mandatory duty that might ostensibly apply to the actions alleged by a tort plaintiff. That is not a sensible manner for litigation to proceed, especially on a jurisdictional issue. Petitioners contend that discovery will be needed in order for plaintiffs to establish a mandatory duty (Pet. 22-23), but that contention fails to distinguish suits under the FTCA from any other litigation in which a plaintiff bears the burden of establishing facts that may not be wholly within his personal knowledge. Insofar as the question here entails a waiver of sovereign immunity, that simply reinforces the allocation of the burden of proof to petitioners.

Nor is there any purchase to petitioners' assertion (Pet. 25) that an "unpredictab[le]" discretionary-function exception would be better defined if the government were to bear the burden of proof. Petitioners cite cases reflecting the varying outcomes in discretionary function suits (Pet. 24-25), but those opinions simply demonstrate that Section 2680(a)'s application turns largely on the nature and circumstances of each particular claim. This Court has repeatedly set forth the general principles needed to analyze claims under Section 2680(a). See, *e.g.*, *Gaubert*, 499 U.S. at 322-323; *Berkovitz*, 486 U.S. at 536-539; *Varig Airlines*, 467 U.S. at 808-814. Those principles remain the touchstone of discretionary-function analysis, and may be applied with

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ception. See *Kosak* v. *United States*, 465 U.S. 848, 851 (1984). That further suggests that FTCA exceptions are not affirmative defenses but rather that they function as elements of the claim, such that the plaintiff bears the ultimate burden of proving the inapplicability of the relevant exception.

equal coherence regardless of which party bears the burden of proof on factual issues relevant to application of the exception. Petitioners fail to explain how placing the burden of proof on the United States would result in further uniformity in application of the exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2009